No. _____

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

THE BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the mootness doctrine's application, based upon the importance of finality of a bankruptcy court's judgment which determined the amount and priority of a lien, precludes a debtor, unable to post a sufficient supersedeas bond, from a right of appeal to an Article III tribunal for the purpose of recovering money wrongfully paid to satisfy a claim which was unenforceable against the debtor under the agreement pursuant to which the debt arose, when all interested parties remain before the court and there has been no intervening event to change the situation.

PARTIES TO THE PROCEEDINGS

Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation were Appellants before the United States Court of Appeals for the Eleventh Circuit. Each of the Petitioners had separately filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, in the United States Bankruptcy Court for the Southern District of Florida.

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP") is a limited partnership formed in accordance with the laws of the State of Florida in 1979, consisting of forty (40) units of limited partnership interests, owned by twenty-five (25) separate persons, for the business purpose of engaging in the development of a mixed-use commercial real estate project in Miami, Florida, referred to as the "Miami Center."

Petitioner Miami Center Corporation (hereinafter referred to as "MCC"), incorporated in the State of Florida in 1979, is the corporate general partner of MCLP.

Petitioner Holywell Corporation (hereinafter referred to as "Holywell"), incorporated in the State of Delaware in 1976, owns ten (10) of the units of MCLP's limited partnership interests and is the parent of Miami Center Corporation.

Petitioner Theodore B. Gould (hereinafter referred to as "Gould") is a resident of Albemarle County in the Commonwealth of Virginia and Holywell's sole stockholder, and prior to the filing in Chapter 11 was MCLP's individual general partner.

Petitioner Chopin Associates (hereinafter referred to as "Chopin"), a general partnership of MCC and Theodore B. Gould, formed in accordance with the laws of the State of Florida in 1979, leased certain land located in Miami, Florida,

PARTIES TO THE PROCEEDINGS – Continued

to MCLP for the development of the Miami Center in accordance with a Ground Lease Agreement, entered into in 1980. The Ground Lease Agreement's provisions *subordinated* Respondent The Bank of New York's liens to Chopin's fee and lessor interests as follows:

> "[T]he holder of any first mortgage . . . on the Lessee's leasehold estate hereunder and in any event any such mortgage . . . placed on the Lessor's fee estate in the leased premises shall be subject and *subordinate* to this lease. . . . " (Emphasis added)

Respondent The Bank of New York ("Bank"), the Appellee below, was the interim construction lender for the development of the Miami Center, evidenced by notes issued by Chopin and MCLP, secured by mortgages and a Building Loan Agreement in which the "contract rate" in interest charged for the original notes of $23,000,000, $42,000,000, and $47,500,000, based upon commitments from Bankers Life Company and the Metropolitan Life Insurance Company to purchase said notes, entered into on March 27, 1980, was as follows:

> "The prime rate is the *minimum* commercial lending rate charged from time to time by the Bank of New York for 90-day loans to responsible and substantial commercial borrowers." (Emphasis added)

Various additional notes were made on and after May 26, 1982, to December 31, 1983, *without* commitments from permanent lenders to purchase the notes, in which the "contract rate" was differently defined, as follows:

> "Interest on the Principal Amount at a rate per annum equal to the prime commercial lending rate of the Bank of New York as *announced* to be in effect from time to time (the "Prime Rate"). . . . " (Emphasis added)

PARTIES TO THE PROCEEDINGS – Continued

On February 26, 1985, the Bank proposed a plan of reorganization on the debtors' behalf in which it offered to purchase the land, leasehold improvements, and certain personal property, referred to as the Miami Center, for the appraised fair market value of $255.6 million payable in accordance with the plan's provisions. Article IV, *Means For Execution Of The Plan.*[1]

The plan's Article I, *Definitions*, defined "BNY Debt" as the indebtedness payable to the Bank, including interest at the contract rate and computed the amount of the debt "due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985,"[2] notwithstanding the fact that the computed amount of $234,342,743 was not calculated based upon the contract rate defined in the loan documents.

The plan's treatment of the Bank's disputed secured Class 2 claim provided that the principal and accrued interest at the "contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV. . . . " The Bank's Class 2 claim was defined as follows:

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[1] Article IV, MEANS FOR EXECUTION OF THE PLAN: *Sale of Miami Center*, provided, in relevant part, as follows: "The purchase price would be paid and applied in the following manner: (a) BNY would receive *a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date*. . . . " (Emphasis added)

[2] *Compare* 11 U.S.C. Section 502(b)(3) prohibiting a bankruptcy court from allowing "unmatured interest" as of the filing date on a disputed claim; see also *Vandston Bondholders Committee v. Green*, 329 U.S. 156, 165 (1946): "Interest on the debtors' obligations *ceases* to accrue at the beginning of the proceedings. . . . " (Emphasis added)

PARTIES TO THE PROCEEDINGS – Continued

> "Article III, CLASSIFICATION OF CLAIMS AND INTERESTS, *Class 2* – The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and *at the post-default contract rate thereafter, attorneys' fees, costs and expenses,* as provided in the documents evidencing such claims and *as authorized under applicable law,* as the same are allowed and ordered paid by the Court." (Emphasis added)

Fred Stanton Smith, appointed by the bankruptcy court as Trustee of the Miami Center Liquidating Trust, for the purpose of carrying out the provisions of the amended consolidated plan of reorganization filed by the Bank on the debtors' behalf, is an interested party.

Other interested parties include the United States of America, the Commonwealth of Virginia, the Miami Center Joint Venture, and various corporate entities and partnerships related to Petitioner Holywell and defined as "Affiliated Creditors" in the reorganization plan filed by the Bank on the debtors' behalf.[3] The claims of "Affiliated Creditors" in these proceedings were subordinated as "insiders" to Class 8, based upon a process of classification established under the plan's provisions.

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[3] The Plan's Article I, *Definitions*, defined "Affiliated Creditors" as including Parkwell, Inc., Orion Industries, Inc., Holywell Construction Company, Charleston Center Corporation, 1300 North 17th Street Associates, Eleventh DuPont Circle Associates, Pietro Belluschi & Associates, Inc. ("PBA, Inc."), Holywell Management of Florida, Inc., Orion Engineering Services, Whitehall Building Services, Whitehall Security Corporation (Fla.), Holywell Telecommunications Company, and Holywell Leasing Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 9

I. The Application Of The "Mootness" Doctrine In The Administration Of The Bankruptcy Laws Cannot Be Construed To Preclude A Debtor Against Whom A Judgment Has Been Entered From Seeking Reversal Of That Judgment On Appeal, And, Having Been Unable To Post The Required Supersedeas Bond, If The Judgment Is Reversed, From Recovering The Money Wrongfully Paid To Satisfy The Debt 9

(a) The Eleventh Circuit's Mootness Standard, Providing Finality To The Orders Of A Bankruptcy Court, Where There Was No Stay, Effectively Denies A Debtor's Right Of Appeal And Protection Of The Laws 12

(b) The Eleventh Circuit Has Extended The Application Of The "Mootness" Doctrine In The Administration Of The Bankruptcy Laws Beyond Limits Established By Other Circuit Courts Of Appeal And, Thus, A Direct Conflict Exists Among The Circuit Courts 15

TABLE OF CONTENTS – Continued

Page

(c) The Eleventh Circuit's "Mootness Standard," Precluding A Debtor's Right To Recover A Wrongful Judgment And Concluding That the Court Lacks Authority To Deal With The Rights Of The Parties As They Stood At The Commencement Of The Case, Is In Conflict With This Court's Precedent 23

II Congress Has Limited The Power Of A Court In A Bankruptcy Case And Proceeding To Modify Contractual Rights And Has Not Granted Such A Court Authority to Impose A Legal Duty Upon A Debtor To Pay A Creditor An Amount In Excess Of The Amount Of The Debt As Determined Under The Loan Documents Or To Subordinate A Claim Having A Superior Priority, Except By Application Of The Principles Of Equitable Subordination 25

CONCLUSION 30

APPENDICES are bound herewith and contain a separate table of contents.

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 13

Atlas Sewing Centers, Inc., 384 F.2d 66 (5th Cir. 1967) 21

Baker v. Carr, 369 U.S. 186 (1962) 14

Bakery Drivers v. Wagshal, 333 U.S. 437 (1948) ... 13, 23

Bank of the United States v. Owens, 27 U.S. 527 (1829) 27

Beaston v. The Bank of Delaware, 12 Pet. 102 (1838) 22

Bond v. Floyd, 385 U.S. 16 (1966) 14

Cahill v. New York, New Haven & Hartford Railroad Co., 351 U.S. 183 (1956) 13, 20, 23

Chopin Associates et al. v. Fred Stanton Smith, Trustee, Case No. 89-5759 (11th Cir. Aug. 14, 1990) 5

Crowell v. Benson, 285 U.S. 51 (1931) 10

Dakota County v. Glidden, 113 U.S. 222 (1885) 13, 23

DeFunis v. Odegaard, 416 U.S. 312 (1973) 14

Flast v. Cohen, 392 U.S. 83 (1968) 14

Hanover National Bank v. Moyses, 186 U.S. 181 (1902) 26

Holywell Corporation v. Bank of New York, 901 F.2d 931 (11th Cir. 1990) 1, 8

TABLE OF AUTHORITIES – Continued

Page

Holywell Corporation v. Smith, Case No. 88-151 (S.D. Fla. July 21, 1988) (unpublished) 8, 18

In re Acequia, 787 F.2d 1352 (9th Cir. 1986) 3

In re Joplin, 882 F.2d 1507 (10th Cir. 1989) 16

In re Matos, 790 F.2d 864 (11th Cir. 1986) 12, 15, 20

In re Roberts Farms, Inc., 652 F.2d 793 (9th Cir. 1981) 9, 17

In re Schultz, 69 B.R. 629 (D.S.D. 1987) 4

In re Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984) 12, 15, 17, 20

In re Sun Valley Ranchers, Inc., 823 F.2d 1373 (9th Cir. 1987) 19

In re Technical Knockout Graphics, Inc., 833 F.2d 797 (9th Cir. 1987) 21

In re Texlon Corp., 596 F.2d 1092 (2nd Cir. 1979) 21

King v. United States, 379 U.S. 329 (1964) 16

Kleiner v. First National Bank of Atlanta, 526 F.Supp. 1019 (N.D. Ga. 1981) 27, 28

Lewis, Trustee v. United States, 92 U.S. 618 (1867) 16

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 26

Louisville Property Co. v. Commissioner of Internal Revenue, 140 F.2d 547 (6th Cir. 1944) 16

TABLE OF AUTHORITIES – Continued

Page

Mancusi v. Stubbs, 408 U.S. 204 (1972) 13

Marbury v. Madison, 1 Cranch 137 (1803) 10

Markstein v. Massey Associates, Ltd., 763 F.2d 1325 (11th Cir. 1985) 12, 15, 17

Mathew v. Weber, 423 U.S. 261 (1976) 10

Matter of CADA Investments, Inc., 664 F.2d 1158 (9th Cir. 1981) 19

Matter of Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1979) 20, 21

Matter of I.J. Knight Realty Corp., 501 F.2d 62 (3rd Cir. 1974) 16

Matter of King Resources Co., 651 F.2d 1226 (10th Cir. 1980) 20

Matter of Latham, 823 F.2d 108 (5th Cir. 1987) 20

Matter of Springpark Associates, 623 F.2d 1377 (9th Cir. 1977), *cert. den.*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980) 19, 20

Miami Center Joint Venture, et al. v. Bank of New York, Case No. 89-5346 (11th Cir. Oct. 2, 1990) 22

Miami Center Limited Partnership v. Bank of New York, 820 F.2d 376 (11th Cir. 1987) 8

Miami Center Limited Partnership v. Bank of New York, 59 B.R. 340 (S.D. Fla. 1986) 8

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Mills v. Green, 159 U.S. 651 (1895) 13, 24

Mitchell v. Clark, 110 U.S. 633 (1883) 26

National Surety Co. v. Coriell, 289 U.S. 426 (1932) 3

Noble v. Union River Logging Railroad Co., 147 U.S. 165 (1892) 25

North Carolina v. Rice, 404 U.S. 244 (1971) 14

Northern Pacific Railway v. Boyd, 228 U.S. 482 (1912) 22

Northern Pipeline v. Marathon Pipe Line, 102 S.Ct. 2858 (1986) 10

Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. Bank of New York, Case No. 85-3230-Civ-Atkins (S.D. Fla. March 24, 1987) 22

Powell v. McCormack, 395 U.S. 487 (1969) 14

Protective Committee v. Anderson, 390 U.S. 414 (1967) 22

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust v. United States of America, Holywell Corporation, Theodore B. Gould, et al., West Publishing 5071 (11th Cir. Sept. 18, 1990) ...5, 17

Fred Stanton Smith, Trustee v. United States of America, Holywell Corporation, Theodore B. Gould, 85 B.R. 898 (Bkrtcy. S.D. Fla. 1988) 23

Technical Color and Chemical Works, Inc. v. Two Guys From Massapequa, Inc., 327 F.2d 737 (2nd Cir. 1964) 3

United Savings Ass'n v. Timbers of Inwood Forest, 108 S.Ct. 626 (1988) 4, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Energy Resources Co., Inc., 110 S.Ct. 2139 (1990) 16

United States v. Munsingwear, 340 U.S. 36 (1950) 14

United States v. Raddatz, 447 U.S. 667 (1980) 10

United States v. Schooner Peggy, 1 Cranch 103 (1801) 11

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 26

United States of America v. Marvin L. Warner and the Unsecured Creditors Committee, M.D. Fla., No. 90-17-Civ-OC16, June 20, 1990 18

Vandston Bondholders Committee v. Green, 329 U.S. 156 (1946) iv

STATUTES

11 U.S.C. Section 105(b) 17

11 U.S.C. Section 361(3) 3

11 U.S.C. Section 363(b) 12
Section 363(c) 12
Section 363(m) 12

11 U.S.C. Section 365 26

11 U.S.C. Section 502(b) 11
Section 502(b)(1) 11, 26
Section 502(b)(3) iv
Section 502(g) 26

11 U.S.C. Section 506(b) 4, 18

11 U.S.C. Section 510(c) 11, 26

11 U.S.C. Section 541(a) 26

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. Section 1104(a) 4, 16

11 U.S.C. Section 1106(a)(6) 16

11 U.S.C. Section 1122 22

11 U.S.C. Section 1123(a)(7) 17
Section 1123(b)(2) 26

11 U.S.C. Section 1125 3

11 U.S.C. Section 1128(a) 3

11 U.S.C. Section 1129(a) 3
Section 1129(a)(1) 19, 26
Section 1129(a)(3) 27
Section 1129(a)(11) 3, 16
Section 1129(b) 3, 22

28 U.S.C. Section 960 16

28 U.S.C. Section 1254(1) 1

31 U.S.C. Section 3713 16

MISCELLANEOUS SOURCES

Bankruptcy Amendments and Federal Judgeship Act of 1984 (P.L. 99-554, 100 Stat. 3088) ii

Bankruptcy Reform Act of 1978 (P.L. 95-598, 92 Stat. 2549) ii

Corbin on Contracts (One Vol. Ed. 1952), Section 212 27

Diamond, Federal Jurisdiction To Decide Moot Cases, University of Pennsylvania Law Review, Vol. 94, January 1946 13

TABLE OF AUTHORITIES – Continued

Page

Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1. Section 69(2), Restatement, Judgments..... 14

United States Constitution, Article III, Section 2..... 14

United States Constitution, Fifth Amendment..... 26

Petitioners Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on July 27, 1990, by denying the Petition For Rehearing and Suggestion of Rehearing In Banc upon that Court's original opinion, entered on May 18, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals, entered on May 18, 1990, is reported at 901 F.2d 931 (11th Cir. 1990) and is reprinted in the Appendix hereto ("App. ___") at 1. The lower court opinions which are the subject of the appeal below and relevant to the Court's consideration of this petition are also reprinted in the Appendix and, if such opinions have been reported, the citations are indicated in the Table of Contents to the Appendix.

STATEMENT OF JURISDICTION

Petitioners filed an appeal to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, entered on November 30, 1988, App. 9, dismissing as moot the debtors' appeal of the Bankruptcy Court's "Judgment Determining Amount, Validity and Extent of Liens of The Bank of New York," App. 11, and barred review on the merits of the debtors' right to recover interest which had been overpaid as a result of the Bank's false representations concerning the loan amount and accrued interest.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On February 5, 1985, the Bank filed a "Complaint To Determine Validity And Extent Of Lien." The Bank alleged that (1) the principal amount of its outstanding loans and accrued interest as of the *filing date* of these proceedings

were *$196,711,481.78* and *$21,181,862.96* respectively, not subject to defense or counter-claims, based upon the "contract rate" of interest specified in the loan documents; and (2) that it had a valid and perfected security interest in the debtors' real and personal property *superior* in priority to Chopin's claim or interest in the Ground Lease with MCLP.

On March 8, 1985, the debtors filed an Answer to the Bank's Complaint, in which the "Third Affirmative Defense" was stated as follows:

> "The Bank acted *fraudulently* in its transactions with the defendants *by making material representations to them that its announced prime rate was the same 'prime rate' defined in the notes executed by defendants when it knew said representations were false and by failing to disclose to the defendants that the agreed upon prime rate was lower than the announced prime rate, with the intent to deceive defendants and to induce them to rely thereon and pay higher interest rates than agreed upon,* such that the damages to which the defendants are entitled shall be an offset to the amount that defendants owe the Bank." (Emphasis added)

On March 20, 1985, the bankruptcy court entered its "Judgment Determining Amount, Validity, and Extent of Liens of the Bank of New York," App. 11, concluding, in relevant part, as follows:

> "Accrued interest on the loans, *determined by the Bank at the 'contract'* (good standing) *rate,* to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985." (Emphasis added) App. 13

> "The lien[s] of the Bank of New York in and to the Debtors' real and personal property *identified in the loan documents* as against the Debtors is *superior* to any other claim or interest of the Debtors in and to said real and personal property." (Emphasis added) App. 14

> "The Bank *advanced* to the Debtors *under the terms of the notes* and mortgages the sum of *$196,711,481.58*. . . . " (Emphasis added) App. 13

Thereafter, on April 8, 1985, the bankruptcy court entered an order denying a Motion for Rehearing, which had been filed on the basis of the factual inaccuracy of the foregoing decision.

On August 8, 1985, the bankruptcy court, having previously deferred a confirmation hearing scheduled for April 29, 1985, *without* notice or hearing[4] entered an order confirming the amended consolidated reorganization plan filed by the Bank on the debtors' behalf, App. 16, without having held an evidentiary hearing to consider objections alleging that the Bank's plan was not fair and equitable.

The bankruptcy court's Confirmation Order approved subordination of the claims of "Affiliated Creditors," based upon a classification process as "insiders," and dismissed the debtors' other objections to the feasibility of the Bank's Plan as lacking in merit,[5] App. 19, having concluded without a factual hearing that the Plan complied with the enumerated requirements of 11 U.S.C. Section 1129(a) and (b). App. 20.

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[4] See 11 U.S.C. Section 1128(a); *National Surety Co. v. Coriell*, 289 U.S. 426, 435 (1932): "[T]he plan should have been reversed in its entirety because the procedure pursued by the District Court was improper. . . . The non-assenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data." *In re Acequia*, 787 F.2d 1352, 1358 (9th Cir. 1986), citing *Technical Color and Chemical Works, Inc. v. Two Guys From Massapequa, Inc.*, 327 F.2d 737, 742 (2nd Cir. 1964): "The Bankruptcy Court must hold an evidentiary hearing in ruling on confirmation."

[5] On April 11, 1985, the "Debtors' Motion To Withdraw From Consideration The Plan Of Reorganization Of The Bank Of New York" was filed on the grounds that (a) the Bank's plan did not satisfy the disclosure requirements of 11 U.S.C. Section 1125; (b) did not provide adequate protection for the property rights of the Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, entities other than the debtors, in accordance with Section 361(3); and (c) did not satisfy the "Feasibility Standard," Section 1129(a)(11), since adequate funds had not been provided for the payment of federal and state income taxes incurred during the bankruptcy court's administration of the estates and arising from the proposed sale of the insolvent debtor MCLP's property.

On September 23, 1985, the bankruptcy court granted a stay of the confirmed plan's implementation subject to the condition that the debtors post a *$140 million* supersedeas bond. Thereafter, on October 3, 1985, the district court "reduced" the amount of the required supersedeas bond to $50 million, providing that such sum would *only* stay enforcement for ninety (90) days.

On October 10, 1985, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, having been appointed by the bankruptcy court as Trustee *after* confirmation in accordance with the confirmed plan's Article V, *Creation of Trust*,[6] conveyed title of the land, leasehold improvements, and certain chattels to the City National Bank of Miami, acting on behalf of M. C. Holdings Partners, the Bank's designee as Purchaser.

The Purchaser was granted a credit of *$196,711,481.53* for the principal amount of the Bank's loans and *$46,016,441.94* in accrued interest to October 9, 1985,[7] subject to an agreement with respect to adjustment of the amount of interest paid, which stated, in relevant part, as follows:

> "It is further agreed that the amount of interest on the loans made to MCLP and Chopin (as such terms are defined in the Contract) taken as a credit pursuant to paragraph 4 of the Contract shall be *subject to review by the Liquidating Trustee* and the Bank for 45 days after the Effective Date (as such term is defined in the Contract) and, *in the event that such review reveals any mathematical errors, then such interest amount shall be adjusted*, said adjustment, if any, to occur within said 45-day period." App. 23 and 24.

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[6] *Compare* 11 U.S.C. Section 1104(a): "At any time after the commencement of the case but *before* confirmation of a plan, on request of a party in interest . . . the court shall order the appointment of a trustee."; see also *In re Schultz*, 69 B.R.629, 631 (D.S.D. 1987) "[I]t was error for the Bankruptcy Court to order the appointment of a Chapter 11 trustee contemporaneous with confirmation of the liquidation plans. . . . ".

[7] *Compare* the bankruptcy court's finding of fact in its Confirmation Order that the Bank's claim was "undersecured." App. 16; see also 11 U.S.C. Section 506(b), and *United Savings Ass'n v. Timbers of Inwood Forest*, 108 S.Ct. 2139 (1990).

On December 30, 1985, the district court entered an "Order Of Remand And Denial Of Motion To Dismiss," App. 25, with respect to the debtors' appeal of the Confirmation Order and a prior order approving a "modified form" of substantive consolidation of the debtors' estates, eliminating MCLP's liability to Chopin for the payment of rent under the Ground Lease[8], and requiring payment of Holywell's liabilities *prior* to use of its assets to pay claims against any other debtors.

On January 29, 1986, the bankruptcy court entered an "Order On Remand," amending its prior Confirmation Order *nunc pro tunc*, and adopted verbatim the findings of fact and conclusions of law as proposed by the Bank, in which the court formalistically adopted the following pertinent finding of fact:

> "The central features of the Bank's amended consolidated plan are: (a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E for its MAI-appraised value of $255.6 million, comprised of (i) satisfaction of the Bank's judgment lien, computing interest at the *contract or 'good standing' rate*. . . . " (Emphasis added)

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[8] Chopin's claim for payment of ground rent included reimbursement for the payment of real property taxes. On September 18, 1990, the Eleventh Circuit denied a petition for rehearing of its prior order, entered on August 14, 1990, affirming the district court's judgment that the bankruptcy court did *not* abuse its discretion in approving a settlement of disputed real property taxes *without* a determination of the priority of the Dade County Tax Collector's unfiled claims or the estate's net value. *Chopin Associates and Miami Center Limited Partnership v. Fred Stanton Smith, Trustee, Bank of New York, Dade County, Florida, et al.*, No. 89-5759.

The settlement negotiated among the defendants approved the disbursement of *$9,382,945* plus interest from the sale proceeds of the *insolvent* debtor MCLP's property for the payment of disputed real property taxes, although the Eleventh Circuit concluded in a related case, *Fred Stanton Smith, etc. v. United States of America, et al.*, No. 89-5862, September 18, 1990, App. 84, that the Liquidating Trustee was *not* responsible for the payment of federal income taxes arising from the property's sale, since no express provision was made in the plan for the payment of income taxes. App. 93, 94.

The bankruptcy court also held, relevant to the present case, as follows:

> "At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien.[9] However, since that amount has been embodied in a final judgment . . . that is now *on appeal* before the district court (*Gould et al. v. The Bank of New York*, Case No. 85-2263-Civ-NCR), the court will *not* revisit that issue. . . . " (Emphasis added)

On December 17, 1986, the Trustee filed a "Motion To Require The Bank of New York to Furnish To The Liquidating Trustee The Minimum Commercial Lending Rate Charged From Time To Time By The Bank of New York For 90-Day Loans To Responsible And Substantial Borrowers And For Other Relief."[10] App. 49.

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[9] The Trustee's accountant, Mr. Donald Denkhaus of Arthur Andersen & Co., testified as follows: " . . . I would like to point out that there is an *uncertainty* involving three of the earlier notes relating to the definition of the Bank of New York's prime rate in those three notes." App. 46.

" . . . It is a legal issue and it is one which I am not qualified to make a decision whether the Bank of New York's prime rate is the one that was used by the Bank of New York *or* whether it is another rate. . . . [B]ecause of this uncertainty, we *requested additional information* from the Bank of New York to *define* what the prime rate is *in accordance with the language that is specified in those three notes*, and until that is resolved we *cannot* finalize our report on this interest computation." (Emphasis added) App. 47 and 48.

[10] On December 29, 1986, the bankruptcy court held a hearing on the Trustee's motion to require the Bank to *furnish* the minimum commercial 90-day lending rate charged from March 27, 1980 to October 9, 1985, to responsible and substantial borrowers, in which the court made the following pertinent statements:

> THE COURT: "Our problem is to lend meaning to words put into a document, as is so often the case, and in this particular instance *the bank's suggestion that what they meant by that language was the prime rate is a most plausible one, most plausible*. In fact, anything else that I have heard so far or can think of at this moment would be totally *preposterous*. . . . " (Emphasis added)
>
> . . .
>
> THE COURT: "To my mind, . . . I think their argument is not only a plausible one, but a correct one, that *the judgment that was entered*

(Continued on following page)

The Trustee's Motion was based upon the following pertinent statements:

"2. In conjunction with the sale and transfer of property provided for in the confirmed Plan, The Bank of New York received credit against the purchase price, for interest to and including October 9, 1985, in the amount of *$46,016,441.49. This credit is an overcharge since it is not based on the minimum commercial rate charged on three of the promissory notes involved*, the $42 million note, the $47.5 million note, and the $23 million note. *If a calculation is made on the minimum commercial rate*, the Liquidating Trustee is *entitled to some $14 or $15 million in credits*." (Emphasis added) App. 50

"3. *The Bank of New York has refused and continues to refuse to make available to the Trust its minimum commercial rate* for the period the said three notes were outstanding, i.e., June 19, 1979, through and including June 19, 1985, *though the Liquidating Trustee on behalf of the Trust has made demand upon The Bank of New York*, through the Trust's accountants and personally, to supply the same." (Emphasis added) App. 50

"5. The Bank of New York further contends that this Court's Judgment of March 20, 1985, . . . determines the amount, validity and extent of the Bank's lien and allows a per diem interest charge of $75,320.16. *It is reservedly called to this Court's attention that while the three notes involved call for a minimum commercial lending rate, The Bank of New York failed to calculate the said proper rate of interest and the sums contained in said Judgment of March 20, 1985, as prepared for this Court's execution, include an erroneous calculation of interest on said three notes*, i.e., interest calculated and charged was [at the Bank's published] prime rate. . . . " (Emphasis added) App. 50 and 51.

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a long time ago, almost two years ago, back in March of '85, *was based on the premise that it dealt with a published prime rate. . . .* " (Emphasis added)

On March 10, 1988, the Eleventh Circuit denied the debtors' petition for rehearing and rehearing *in banc*, dismissing their appeal of the bankruptcy court's Confirmation Order, 838 F.2d 1547 (11th Cir. 1988), and reaffirmed its prior conclusion that *the Plan's substantial consummation precluded effective judicial relief* with respect to the "discrete and consummated sale" of the Miami Center, 820 F.2d 376 (11th Cir. 1987). The Eleventh Circuit directed the district court below to *vacate* its judgment, 59 B.R. 340 (S.D. Fla. 1986), affirming the consolidation order and the confirmation order of the bankruptcy court.

On November 30, 1988, in the present case, the district court dismissed as *moot* the debtors' appeal of the bankruptcy court's judgment determining the priority and amount of the Bank's loans, on the grounds stated as follows:

> "Upon consideration of the record in this cause, and after hearing, it appears to the Court that this cause is controlled by the recent decision of *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, Case Nos. 87-1988 and 98-1989 (U.S. October 3, 1988). See also *Holywell Corporation v. Smith*, Case No. 88-151 (S.D. Fla. July 21, 1988)." App. 9

On May 18, 1990, the Eleventh Circuit held that the debtors' appeal from the bankruptcy court's judgment determining the amount, validity and extent of the Bank's liens was moot, based upon the following findings of fact and conclusions of law:

> "The plan of reorganization was adopted under the assumption that the Bank would be permitted to rely upon the amount of interest the bankruptcy court found to be correct. . . . *It might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court. However, the amount of the judgment lien was calculated using that interest rate*, and the purchase price of the property was funded in substantial part by elimination of the mortgage lien. Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the

sale to the Bank, to which the Bank agreed." (Emphasis added) App. 5 and 6.

"The debtors . . . attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. *Since the debtors failed to post an appeal bond, the reorganization plan was implemented; the plan has been substantially consummated.* The debtors' efforts . . . to require the Bank to 'sweeten the pot' after this principal transaction, the sale of the property, has been completed must fail. *The amount of interest established in the adversary proceeding in the bankruptcy court was included in the Bank's bargain for the purchase of the project,* which constituted a large part of the confirmed plan. It is now impossible and unjust to amend the plan as consummated, and we are unable to fashion effective relief for all concerned, *see In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981), *cited in Miami Center*, 838 F.2d at 1556." (Emphasis added) App. 7 and 8.

REASONS FOR GRANTING THE WRIT

I. The Application Of The "Mootness" Doctrine In The Administration Of The Bankruptcy Laws Cannot Be Construed To Preclude A Debtor Against Whom A Judgment Has Been Entered From Seeking Reversal Of That Judgment On Appeal, And, Having Been Unable To Post The Required Supersedeas Bond, If The Judgment Is Reversed, From Recovering The Money Wrongfully Paid To Satisfy The Debt.

The principal reason for granting the Writ is that the Eleventh Circuit's application of the Mootness Standard in the administration of the bankruptcy laws is an improper exercise of judicial power in direct conflict with uniform precedent of other circuit courts of appeal, a misconstruction of the constitutional doctrine that a federal court can only hear and resolve a "case or controversy," and importantly,

violates the fundamental constitutional principle of the separation of powers assigning to an Article III tribunal the duty of preserving the individual's vested legal rights.

In *Northern Pipeline v. Marathon Pipe Line*, 102 S.Ct. 2858, 2876 (1986), the plurality opinion's analysis of the "adjunct" doctrine defined in *Crowell v. Benson*, 285 U.S. 51 (1931), stated

> "Crowell recognized that Art. III does not require 'all determinations of fact [to] be made by judges,' 285 U.S., at 51, 52 S.Ct., at 292; with respect to congressionally created rights, some factual determinations may be made by a specialized fact finding tribunal designated by Congress, without constitutional bar, *Id.*, at 54, 52 S.Ct., at 296. [However] the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme . . . , the Court emphasized that 'the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases'."

Furthermore, the plurality concluded, citing *United States v. Raddatz*, 447 U.S. 667 (1980), quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976), that " '[t]he authority – and the responsibility – to make an informed, final determination . . . remains with the judge.' "

No principle in a government of laws is more important than Chief Justice Marshall's statement in *Marbury v. Madison*, 1 Cranch 137 (1803):

> "[*t*]*he very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury.* One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. *It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.*" (Emphasis added)

As Chief Justice Marshall also stated, in *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801):

> "The law must be obeyed, or its obligations denied. . . . The court must decide according to existing laws and if necessary to set aside a judgment . . . which cannot be affirmed but in violation of law."

The controlling substantive law in this case is 11 U.S.C. Section 502(b)(1) and 11 U.S.C. Section 510(c). If the bankruptcy court's judgment determining the amount and priority of the Bank's liens was contrary to these provisions of the Bankruptcy Code, it was the obligation of the appellate courts below to vacate such a judgment in violation of law.

First, since the Bank's secured claim was disputed, the bankruptcy court's authority to allow such a claim was limited by Section 502(b), which provides, in relevant part, as follows:

> "[T]he court . . . shall determine the amount of such claim . . . and shall allow such claim . . . except to the extent that (1) such claim is *unenforceable against the debtor and property of the debtor, under any agreement*. . . . " (Emphasis added)

The bankruptcy court lacked the authority to impose a legal duty upon the debtors Chopin and MCLP to pay the Bank an amount in excess of the amount of the debt as determined under the loan documents.

Second, Section 510(c) provides, in relevant part, as follows:

> " . . . after notice and a hearing, the court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim. . . . "

The bankruptcy court lacked the authority to enter a judgment by fiat subordinating Chopin's recorded superior rights in the property to the Bank's liens.

(a) The Eleventh Circuit's Mootness Standard, Providing Finality To The Orders Of A Bankruptcy Court, Where There Was No Stay, Effectively Denies A Debtor's Right Of Appeal And Protection Of The Laws.

In this case, the Eleventh Circuit has denied the debtors' right to recover a sum paid to the Bank in excess of the amount due on the debt, as determined under the loan documents, relying upon a Mootness Standard, defined, in relevant part, in *Miami Center Limited Partnership*, 838 F.2d at 1553, as follows:

> "The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. Section 363(m), but this provision applies only to the sale of the debtors' property by the trustee pursuant to Section 363(b) or (c). *Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation.*"
>
> "The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a trustee under Section 363(b) or (c). *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Matos*, 790 F.2d 864 (11th Cir. 1986)."
>
> "With respect to the purpose of the mootness rule, the court held:
>
> This rule of law [lack of power in the court to rescind sale where there has been no stay] *was intended to provide finality to orders of bankruptcy courts* and to protect the integrity of the judicial sale process upon which good faith purchasers relied. *Id.* at 1327." (Emphasis added)
>
> . . .
>
> "The 'good faith purchaser' is one who buys in good faith, that is, *free of any fraud or misconduct* and for value and *without knowledge of any adverse claim.* [citations omitted]." [Emphasis added]

. . .

"[I]n a reorganization case matters not directly related to sales are within the mootness rule[.] [T]*he court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances.* . . . The court may consider whether the relief granted by the court could implicate or *have an adverse effect on non-party creditors and will affect the reemergence of the debtor as a revitalized entity.*" (Emphasis added) *Id.* at 1554-1555.

First, consider the Eleventh Circuit's Mootness Standard as a substantive constitutional doctrine. The principal questions in the proper application of the "mootness" doctrine[11] are (a) whether a real and substantial controversy exists admitting of specific relief through a decree of conclusive character, *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937); (b) whether the court has been deprived of the authority to deal with the rights of the parties as they stood at the commencement of the suit and to undo wrongful conduct, *Mills v. Green, supra* at 654; and (c) whether the debtor against whom a judgment for money is entered, having paid that judgment and failed to post a supersedeas bond, if the judgment is reversed on appeal, has a right to recover his money. *Dakota County v. Glidden*, 113 U.S. 222 (1885); *Bakery Drivers v. Wagshal*, 333 U.S. 437 (1948); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); and *Cahill v. New York, New Haven & Hartford Railroad Co.*, 351 U.S. 183, 194 (1956).

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[11] See Diamond, Federal Jurisdiction To Decide Moot Cases, Univ. of Pennsylvania Law Review, Vol. 94, January 1946, p. 146: "There must be a real controversy involving actual facts. The case must seek, not an advisory opinion, but a judgment that can operate to grant conclusive and specific relief. The parties to the controversy must be adverse, both in the sense that the plaintiff and defendant represent opposing interests and in the sense that some right of the plaintiff has been invaded or threatened. Neither the controlling law nor the controlling fact situation can have changed to such an extent that the relief sought has already been obtained, or that the court is without power to grant it."

The Article III, Section 2 "case or controversy" requirement "limit[s] the business of the federal courts to questions presented in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The parties must have a "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). It is undisputed that "Federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1973), citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A case is moot if "The controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.' [citation omitted]" 416 U.S. at 317.

Second, it is necessary to determine whether the issues in this case are "live" and the rights of the parties have been preserved. "A case is moot when the issues are no longer 'live' or the parties lack a legally cognizable interest in the outcome. . . . [But] where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 487, 496 (1969). *Bond v. Floyd*, 385 U.S. 16 (1966), rejects the theory that the mootness of a "primary" claim requires a conclusion that all secondary claims are moot.

This Court has specified the established practice of vacating a judgment below and remanding with the direction to dismiss cases which have become moot pending appellate review:

> " . . . clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).[12]

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[12] See f.n. 1, citing Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1. Restatement, Judgments, Section 69(2) states:

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In the present case, the controversy between the Bank and the debtors has been presented in an adversary context. The debtors' right to recover an estimated $14 million is a real and substantial controversy. The debtors have preserved their right of appeal. The Bank could not have relied upon any statement or the debtors' conduct to conclude that the controversy no longer existed. The issues are "live" and could not have been prejudiced by the Eleventh Circuit's prior "mootness" ruling, since the controversy does not involve an increase in the Miami Center's sale value, *Miami Center*, 838 F.2d at 1555, and it was the obligation of the court below to protect the debtors' vested legal right to a determination of the correct amount of the Bank's disputed Class 2 secured claim, provided for under the Building Loan Agreement.

(b) The Eleventh Circuit Has Extended The Application Of The "Mootness" Doctrine In The Administration Of The Bankruptcy Laws Beyond Limits Established By Other Circuit Courts Of Appeal And, Thus, A Direct Conflict Exists Among The Circuit Courts.

The abuses arising from the Eleventh Circuit's application of the Mootness Standard in *Miami Center Limited Partnership* based upon its prior decisions in *Sewanee*, *Markstein*, and *Matos*, have been illustrated in the judgments entered by the Eleventh Circuit and various lower courts adopting *Miami Center* as a precedent.

In *Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust v. United States of America, Holywell Corporation, Theodore B. Gould, et al.*, App. 84, the Eleventh Circuit concluded that neither the provisions of the confirmed Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes arising from the

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"Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

postconfirmation sale of the insolvent debtor MCLP's property, dismissing the following arguments as moot:

(a) The bankruptcy court lacked statutory authority to confirm a plan without assuring itself that reorganization will succeed, Section 1129(a)(11), and adequate means had been provided for the payment of income taxes arising from the sale of the estate's property in accordance with the plan's provisions;[13] and

(b) The court had not been relieved of the authority to remedy the injury caused by the Bank's fraudulent conduct, as the plan's proponent, in (1) failing to disclose that funds had not been provided for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property and (2) proposing the court's appointment of an individual as Trustee of the Miami Center Liquidating Trust,[14] assigned title and vested with possession of substantially all of the debtors' property, to carry out the plan's provisions, without satisfying Section 1104(a) for the purpose of avoiding the superior priority of the United States for the payment of income taxes arising from such a sale.

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[13] See *U.S. v. Energy Resources Co., Inc.*, 110 S.Ct. 2139, 2142 (1990): "The Code . . . requires the bankruptcy court to assure itself that reorganization will succeed, Section 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax debt owed. . . . Even if consistent with the Code . . . a bankruptcy court order might be inappropriate if it conflicts with another law (i.e., the Internal Revenue Code) that should have been taken into consideration in the exercise of the court's discretion."

[14] Compare 28 U.S.C. Section 960 which provides, in relevant part, as follows:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business as if it were conducted by an individual or corporation."

Compare 31 U.S.C. Section 3713; *Lewis, Trustee v. United States*, 92 U.S. 618, 622 (1867); *King v. United States*, 379 U.S. 329, 338 (1964); *In re Joplin*, 882 F.2d 1507, 1509-1510 (10th Cir. 1989); *Matter of I. J. Knight Realty Corp.*, 501 F.2d 62, 64, 66, 67 (3rd Cir. 1974); and *Louisville Property Co. v. Commissioner of Internal Revenue*, 140 F.2d 547 (6th Cir. 1944). See also 11 U.S.C. Section 1106(a)(6).

The Eleventh Circuit's opinion relied upon the following analysis of its prior *Miami Center* ruling defining the court's Mootness Standard:

> "The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. See *Markstein v. Massey Associates, Ltd.*, 763 F.2d (11th Cir. 1985); *In re Roberts Farms, Inc.*, 652 F.2d 798 (9th Cir. 1981); *Miami Center Limited Partnership*, 838 F.2d 1547. The mootness standard '*is premised upon considerations of finality* . . . and the court's inability to rescind . . . and grant relief on appeal.' *Miami Center Limited Partnership*, 838 F.2d at 1558 [quoting *In re Sewanee Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984)]. In dismissing the debtors' previous challenge, this court was guided by 'the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained.' *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge in the Plan which seeks to modify or amend its provisions. . . . *The need for finality requires that we decline to address the merits of these allegations which seek to challenge the court-approved Plan.*" (Emphasis added) *Id.* at 5076.

Thus, the Eleventh Circuit concluded that its Mootness Standard precluded a collateral attack on the bankruptcy court's confirmation of a plan the contents of which (1) made no provision for the payment of federal and state income taxes incurred during the court's administration of the estate and arising from the sale of an insolvent debtor's property in accordance with the liquidating plan's provisions; and (2) although public policy militates against the court's appointment of a person, granted the power to sell the estate's property and receive income on the estate's behalf in which other persons own the beneficial interest, as a receiver, *compare* 11 U.S.C. Section 105(b) and Section 1123(a)(7), the trustee was relieved of the statutory duty to file income tax

returns and pay taxes on the income earned by the various fiduciary estates in his custody.

In the unrelated case of *United States of America v. Marvin L. Warner and the Unsecured Creditors Committee*, M.D. Fla., No. 90-17-Civ-OC16, June 20, 1990, the district court held that an appeal of the bankruptcy court's confirmation order was moot. In that case, the district court also relied upon the Eleventh Circuit's Mootness Standard defined in *Miami Center* and concluded as follows:

> "The *Miami Center* Court went *beyond* prior precedent in this circuit, and ruled that: . . . in considering whether in a reorganization case matter not directly related to sales are within the mootness rule, *the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated*, and whether there has been a comprehensive change in circumstances." (Emphasis added)

The district court held that "The parties affected by the plan cannot be returned to the positions they occupied prior to the plan going into effect because *monies and property worth millions of dollars have been transferred. . . .* " Thus, the Court concluded as follows:

> "There has been a comprehensive change in circumstances in reliance on the Plan, and *vacating the order of confirmation would undermine the virtues of finality that the mootness doctrine has been designed to protect.*" (Emphasis added)

In *Holywell Corporation v. Fred Stanton Smith*, S.D. Fla., Case No. 88-151-Civ-SMA, July 21, 1988 (unpublished), the district court stated that:

> " . . . under Section 506(b) of the Code, a postpetition interest credit is *only* [original emphasis] appropriate for an oversecured creditor. See *United Stav. [sic] Ass'n of Texas v. Timbers of Inwood Forest*, 108 S.Ct. 626, 631 (1988) . . . [and] [i]t is also undisputed that BONY applied a $27,050,115.02 credit towards the purchase price of the Miami Center project representing postpetition interest."

Nevertheless, citing the Eleventh Circuit's Mootness Standard defined in *Miami Center*, the district court held that the question of "whether or not BONY was 'entitled' to obtain the credit [payment of postpetition interest on an undersecured claim], is *now lawful in the sense that it is an integral component of the confirmed plan*," (Emphasis added), notwithstanding the strictly jurisdictional requirement of Section 1129(a) (1) prohibiting a court from confirming a plan which does *not* comply with the applicable provisions of title 11.

The above cases conclude that although there is a real and substantial controversy admitting of specific relief, and the question has been presented in an adversary context, providing finality to the orders of bankruptcy courts as an administrative practice *supersedes* substantive rights of law. Other circuit courts of appeal have declined to follow the Eleventh Circuit's Mootness Standard in the administration of the bankruptcy laws.

First, compare the Eleventh Circuit's Mootness Standard with the principle that a case is *not* moot if all essential parties are before the court. The Ninth Circuit held in *In re Sun Valley Ranchers, Inc.*, 823 F.2d 1373, 1374 (9th Cir. 1987), as follows:

> "We have generally held that where an automatic stay is lifted, the debtor's failure to obtain a stay pending appeal renders an appeal moot after assets in which the creditor had an interest are sold. [citations omitted]. . . . We have, however, carved out a narrow exception to this rule, *where real property is sold to a creditor who is a party to the appeal. Matter of Springpark Associates*, 623 F.2d 1377 (9th Cir.), *cert. den.*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); see also *Matter of CADA Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981). ("[I]n contrast to other cases in which we have addressed comparable mootness problems, *all essential parties are before the court*"). In *Springpark*, we held that a *debtor's failure to obtain a stay . . . followed by the sale of the debtor's property, did not moot the subsequent appeal because the creditor-purchaser was before the court.* . . . In

> such a case, we said in *Springpark*[15] 'It would not be impossible for the Court to fashion some sort of relief.' *Id.* . . . *We decline to follow the Eleventh Circuit's contrary position.* See *In re Matos*, 790 F.2d 864, 866 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1295 (11th Cir. 1984). Sun Valley's appeal is therefore not moot." (Emphasis added)

Second, compare the Eleventh Circuit's mootness ruling in this case with the principle that satisfaction of a judgment does not moot an appeal unless the plaintiff is misled into believing the controversy has ended. The Fifth Circuit in *Matter of Latham*, 823 F.2d 108, 111 (5th Cir. 1987) held, citing *Cahill v. New York, New Haven & Hartford Railroad, Co., supra*, that "satisfaction of a judgment does not moot the appeal unless the defendant-appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended." In *Latham*, as in the present case, the judgment was not satisfied by the appellant. Thus, the Fifth Circuit held that the creditor could not have been misled into believing the controversy was over because the appeal was still being pursued, and concluded as follows:

> "[a]lthough changes in circumstances could cause difficulties, *the payment of an erroneous judgment certainly can be recovered.* This appeal is not moot." (Emphasis added)

Third, compare the Eleventh Circuit's mootness ruling with the precedent that issues are *not* moot concerning the plan's requirement that the trustee's actions "[d]eal with the Trust Property . . . as would be lawful for any person owning the same to deal therewith." The Tenth Circuit held in *Matter of King Resources Co.*, 651 F.2d 1326, 1332 (10th Cir. 1980), citing *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-195 (9th Cir. 1977), that although a confirmation order was not stayed pending appeal, the appeal was not moot.

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[15] It is interesting to note that Senior Circuit Judge Elbert P. Tuttle, sitting by designation, wrote both the Ninth Circuit's *Springpark* opinion and the Eleventh Circuit's contrary opinion in this case.

The Tenth Circuit held that it could not be said that a decision that a plan was erroneously confirmed could not have some effect on proceedings below, even if its judgment could not adversely affect a *third-party* "good faith" purchaser. The Tenth Circuit held, quoting *Combined Metals Reduction Co.*, as follows:

> "Although the appellant did not obtain a stay of that [confirmation] order, this issue differs from the other appeals covered by the trustee's motion to dismiss. . . . *While much of the debtor's property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee.* . . . " (Emphasis added)

Fourth, in the present case, the plan has not been fully administered and the case closed. The Ninth Circuit's opinion in *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987) held that:

> "This appeal is not rendered moot by confirmation of the debtor's reorganization plan. The reorganization plan provides for complete payment of the debtor's tax liabilities,. . . . However, *this does not guarantee the plan will succeed*,. . . . Thus, the government's need for recourse . . . remains important after confirmation of the reorganization plan." (Emphasis added)

The Second Circuit properly held in *In re Texlon Corp.*, 596 F.2d 1092 (2nd Cir. 1979), that finality of judgment is important, but so is correctness, and the court's duty is to remedy injury and ensure justice.

The Eleventh Circuit's reliance upon the alleged rule of law in the administration of the bankruptcy laws that substantial consummation of a confirmed plan precludes effective judicial relief is in conflict with *Atlas Sewing Centers, Inc.*, 384 F.2d 66, 89 (5th Cir. 1967):

> "It would be shocking if merely because of the entry of an order which by name and content was an order of substantial consummation, the Court would find itself powerless to take protective action in the face of admitted substantial nonfulfillment and,

worse, a demonstrated probability that the Plan can never be consummated."

It is undisputed that claims with a priority *superior* to the Bank's liens on the property have purposely *not* been paid. The Confirmation Order has also been *reversed* by another judge in the same district court, *Olympia & York Florida Equity Corp. and Miami Center Joint Venture* ("MCJV") *v. Bank of New York*, Case No. 85-3230-Civ-Atkins, March 24, 1987. In that case, the district court, concluded "The plan, as structured, is not fair and equitable . . . ,"[16] having held in a related case that "[t]he Bank filed the UCC-1 forms reflecting and recording the priority rights of MCJV [Miami Center Joint Venture (not a debtor)] as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors." As of September 30, 1990, MCJV's unpaid allowed claim amounted to $21,400,404.

The Eleventh Circuit has held that since the confirmed plan proposed by the Bank on the debtors' behalf made no provision for the payment of federal income taxes arising from the sale of the insolvent debtor MCLP's property in accordance with the liquidating plan's provisions, the Liquidating Trustee is *not* responsible for the payment of such taxes.[17] App. 93, 94. If the Eleventh Circuit

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[16] On October 2, 1990, the Eleventh Circuit affirmed the district court's reversal of the bankruptcy court's Confirmation Order, having concluded that the Bank's plan did *not* comply with the provisions of title 11, notably Section 1122, and that the Bank's plan discriminated unfairly with respect to MCJV, an impaired creditor. 11 U.S.C. Section 1129(b) (1). *Miami Center Joint Venture, et al. v. Bank of New York*, No. 89-5346. Compare *Protective Committee v. Anderson*, 390 U.S. 414, 441 (1967): "A bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable.' This standard incorporates the absolute priority doctrine under which creditors . . . may participate only in accordance with their respective priorities. . . . [P]articipation by junior interests depends upon the claims of senior interests being fully satisfied. . . . " See also *Northern Pacific Railway v. Boyd*, 228 U.S. 482, 504 (1912): "If purposefully . . . a single creditor was not paid, or provided for in reorganization, he could assert his superior rights against the subordinate interests . . . in the property transferred. . . . The property was a trust fund charged primarily with the payment of . . . liabilities."

[17] Compare *Beaston v. The Bank of Delaware*, 12 Pet. 102, 136 (1838): "no one can be divested of his property, by any mode of conveyance, statutory or

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has erred and the Trustee of the Liquidating Trust, as the court's agent, has a statutory obligation for the payment of income taxes on behalf of the fiduciary estates in his custody, then the liquidating plan cannot be fully administered and will necessarily fail.[18]

(c) The Eleventh Circuit's "Mootness Standard," Precluding A Debtor's Right To Recover A Wrongful Judgment And Concluding That The Court Lacks Authority To Deal With The Rights Of The Parties As They Stood At The Commencement Of The Case, Is In Conflict With This Court's Precedent.

In *Dakota County v. Glidden*, 113 U.S. at 224, *this* Court stated the fundamental principle of the mootness doctrine applicable in this case:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money."

In *Cahill v. New York, New Haven & Hartford Railroad Co.*, 351 U.S. 183, 184 (1958), citing *Bakery Drivers Union v. Wagshall*, 333 U.S. at 442, this Court concluded that the respondent's motion to appeal a judgment was not moot, on the following grounds applicable in this case:

> "Prior to the filing of this motion, and after the District Court denied an application for a stay of execution, the judgment was satisfied; but petitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment."

(Continued from previous page)

otherwise, unless at the same time, and by same conveyance, the grantee becomes invested with title. . . . The moment the transfer of property takes place, under statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust."

[18] See *Fred Stanton Smith, Trustee v. United States of America, Holywell Corporation, Theodore B. Gould*, 85 B.R. 898, 903 (Bkrtcy. S.D. Fla. 1988): "The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan. . . . *A modification would require the liquidating trustee to recover millions of dollars already paid to creditors.*" (Emphasis added)

In the seminal case of *Mills v. Green*, 159 U.S. at 654, this Court stated that a case is moot if an intervening event occurs beyond "the control of either party" but a court "is not deprived of the authority, whenever in its opinion justice requires it, to deal with the parties as they stood at the commencement of [a] suit, and to . . . undo what . . . has [been] wrongfully done. . . . " *Id.*

In the present case, the essential parties are before the court and the controversy remains unresolved. No intervening event has occurred subsequent to the bankruptcy court's entry of its judgment, determining the amount and priority of the Bank's liens, which could be construed as depriving a court of the authority to compel the Bank to determine the amount of its loans based upon the lower "contract" rate and to allow the debtors to recover their money.

In accordance with the reorganization plan's provisions, the bankruptcy court's judgment was *not* a "final"[19] order, no longer subject to appeal. Thus, specific relief could be granted through a decree of conclusive character. There has been no settlement or compromise upon which the Bank could have relied to conclude that the debtors had promised to pay a sum exceeding their debt under the contractual loan documents.

Payment of the erroneous judgment was *not* made by the petitioners. As the Seller of the insolvent debtor MCLP's property, the Trustee allowed the Bank to take a credit in satisfaction of the bankruptcy court's judgment, subject to an agreement that "the amount of interest on the loans made to MCLP and Chopin- . . . taken as a credit shall be subject to review by the Liquidating Trustee and the Bank for 45 days after the Effective Date . . . then such interest amount shall be adjusted. . . . " In fact, the Eleventh Circuit was aware that the "trustee claim[ed] substantial additional sums from the bank as a result of examination and audit of the bank's interest charges . . . in the sale of the Miami Center property." 838 F.2d at 1555.

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[19] "*Final*: shall mean with respect to any order, decree or judgment of any Court, that such order, decree or judgment is *no longer subject to appeal* or rehearing and *as to which no appeal*, rehearing or motion for rehearing is then pending." Art. I, *Definitions*, p. 5. (Emphasis added)

The Bank was not misled into believing that the controversy concerning the priority and amount of its loans had ended because the debtors' appeal of the bankruptcy court's judgment was pursued in a timely fashion.

II. Congress Has Limited The Power Of A Court In A Bankruptcy Case And Proceeding To Modify Contractual Rights And Has Not Granted Such A Court Authority to Impose A Legal Duty Upon A Debtor To Pay A Creditor An Amount In Excess Of The Amount Of The Debt As Determined Under The Loan Documents Or To Subordinate A Claim Having A Superior Priority, Except By Application Of The Principles Of Equitable Subordination.

In considering the reasons for granting the Writ, the first question which must be raised is strictly jurisdictional. It is a fact, the existence of which is necessary to the validity of the proceedings below and without which the judgment of the bankruptcy court is a mere nullity, subject to collateral attack. See *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 173 (1892). It is clear that the application of the Eleventh Circuit's Mootness Standard providing "finality to the orders of bankruptcy courts," *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d at 1553, cannot be applied to the judgment of a court which is itself a nullity for lack of authority.

The principal question in the circuit court below was whether "the contract interest rate used to calculate the amount of the Bank's lien was excessive, because it was based on the Bank's published prime rate instead of the *lower rate provided for in the contract.*" (Emphasis added) App. 4. The Eleventh Circuit's panel has relied upon its prior "mootness" ruling and concluded that "[t]he plan of reorganization was adopted under the assumption that the Bank would be permitted to rely upon the amount of interest the bankruptcy court found to be correct," App. 5.

The Eleventh Circuit's prior "mootness" ruling, dismissing the debtors' appeal of the Confirmation Order, concluded that the Miami Center's sale did not "stand independently and apart from the plan of arrangement and . . . stands solely upon the order confirming the plan of arrangement . . . and confirmation of the

transactions," 838 F.2d at 1555. Thus, the issue must be resolved as to whether the bankruptcy court had authority to confirm a plan construed as altering the debtors, legal, equitable, and contractual rights, without applying the principles of equitable subordination, and to impose a legal duty upon MCLP and Chopin to pay the Bank an amount in excess of the outstanding debt as determined under the loan documents. See 11 U.S.C. Section 1129(a)(1); Section 510(c); and Section 502(b)(1).

First, it is undisputed that no provision of the Constitution prohibits Congress in the enactment of a uniform bankruptcy law from granting courts in bankruptcy cases and proceedings authority to impair the obligation of contracts, *always* subject to the Fifth Amendment's due process of law requirements. *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589 (1935); *Hanover National Bank v. Moyses,* 186 U.S. 181, 188 (1902); *Mitchell v. Clark,* 110 U.S. 633, 643 (1883); *United States v. Security Industrial Bank,* 459 U.S. 70, 75 (1982).

In the present case, the debtors' Section 541(a) property includes contractual rights, and the Due Process Clause precludes the bankruptcy court from exercising authority to impair the debtors' contractual right to recover money wrongfully paid as interest to the Bank. Such funds are "property" of the estates of the debtors Chopin and MCLP.

Congress has specifically limited the power of a bankruptcy court to modify contractual rights. Section 1123(b)(2) provides that a plan's contents may include the assumption, rejection or assignment of a contract subject to Section 365. After notice and a hearing, a court may allow a claim arising from the rejection of a contract. Section 502(g). After notice and a hearing, a court may, under principles of equitable subordination, subordinate, for purposes of distribution, all or part of an allowed claim arising under a contract to all or part of another allowed claim. Section 510(c). As previously noted, a bankruptcy court's authority to allow a disputed secured claim is limited by the contractual terms of the agreement under which the debt arose. Section 502(b)(1).

No provision of title 11 grants a court authority to confirm a reorganization plan based upon the assumption that a creditor could rely upon a court's power to impose a legal duty upon a debtor to

pay a debt in excess of the amount owed under the loan documents.

Second, the opposite construction that, although "the notes called for a lower interest rate than that accepted by the bankruptcy court," App. 6, as the plan's proponent, the Bank could "rely upon the amount of interest the bankruptcy court found to be correct," App. 5, is inconsistent with the fundamental principles of contract law. The bankruptcy court lacked the authority to impose a legal duty upon the debtors to pay the Bank an amount in excess of the debt payable under the contractual loan documents.[20]

Basic contract law does not construe as "bargained for" something that was obtained by fraud. A contract whose subject matter is unlawful is considered void and unenforceable, see *Bank of the United States v. Owens*, 27 U.S. 527 (1829). Thus, if the "contract" rate for which the Bank "bargained" in the reorganization plan which it drafted was obtained by fraud and the failure to disclose the proper loan amount, then the plan was not proposed in good faith, and the bankruptcy court lacked authority to confirm such a plan. Section 1129(a)(3).

The present case bears remarkable similarities to *Kleiner v. First National Bank of Atlanta*, 526 F.Supp. 1019 (N.D. Ga. 1981). In *Kleiner*, the borrowers alleged, among other things, that First National Bank had wrongfully charged interest on the basis of a "published" prime rate rather than the lower rate provided for in their promissory notes – which stated that the interest rate would be "one percent above the 'prime rate,' and basically defined in the notes as the rate available to the Bank's most creditworthy commercial borrowers, [footnote omitted]." *Id.* at 1020-1021. The First National Bank responded that it intended to refer only to its

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[20] *Corbin On Contracts* (One Vol. Ed. 1952), Section 212, "Promises In Excess Of The Existing Debt Or Duty," states: "While an existing debt or legal duty is a sufficient reason for enforcing a promise to pay that debt, or any part of it, . . . it is not a sufficient reason for enforcing a promise to do anything else. [Footnote omitted] *The new promise must be co-extensive with the existing debt . . . or must be to render a performance that is wholly and exactly included within that debt* . . . Thus an existing overdue debt of $100 is a sufficient basis to sustain the debtor's promise to pay $100 to the creditor, or to pay $80 or any other sum less than $100; but *it is not a sufficient basis for a promise to pay $101*." (Emphasis added)

published rate, and that the note's specific phraseology should not be given substantial weight.

The district court ruled that the borrower had stated a legally cognizable breach of contract claim, and began its analysis by observing that:

> "A note is a contract between the lender and borrower. Where the terms of the contract are clear and unambiguous, the intent of the parties is presumed to be expressed in the language used." *Id.* at 1022.

The district court concluded that the language in the notes did *not* reflect the parties' intention to define the term "prime rate" as the published prime rate, but rather as the rate charged by First National Bank to its best commercial borrowers with respect to 90 day borrowings.

Furthermore, the district court stated that adopting the bank's theory "would be tantamount to depriving the parties of the right to set contractual terms of their choosing," *Id.* at 1023, and because the bank had set the interest rate unilaterally, it was under an obligation of good faith in determining the rate. Thus, the borrower had the right to recover interest which had been overpaid without the borrower's knowledge.

In the present case, the Bank entered into an enforceable bargain with its borrowers Chopin and MCLP in which the borrowers made a promise to repay certain loans in accordance with the terms of the original notes of $23,000,000, $42,000,000, and $47,500,000, and the Bank promised to charge interest at "the minimum commercial lending rate charged from time to time by the Bank of New York for 90-day loans to responsible and substantial commercial borrowers."

Chopin relied upon the Bank's promise that MCLP's liability for the payment of ground rent, including reimbursement for payment of *ad valorem* real property taxes, would have a priority superior to the lien securing the Bank's loan on the lessor's fee estate and the liens on MCLP's leasehold estate. The Bank's Complaint fraudulently alleged that it had a perfected security interest in Chopin's property superior in priority to the Ground Lease between Chopin and MCLP, App. 81 and 82. The reorganization plan's "modified form" of substantive consolidation of the

debtors' estates, as proposed by the Bank, "eliminated" MCLP's liability to Chopin for the payment of ground rent, App. 83.[21]

Chopin and MCLP relied upon the Bank's promise that it would unilaterally determine the amount of its original notes and accrued interest based upon the "Prime Rate" *as defined in the contractual loan documents.*

Holywell and Gould entered into agreements guaranteeing repayment of various loans in excess of the original notes made by the Bank and, in addition, loaned *$9,533,159* to MCLP for payment of its liabilities in reliance upon the Bank's promise to determine the loan amount and accrued interest payable by its Borrowers Chopin and MCLP on the original notes based upon the terms of those notes.

Third, the Bank failed to calculate the loan amount based upon the "contract" rate in *drafting* the "Judgment Determining The Amount, Validity, And Extent of The Bank of New York's Liens" for the bankruptcy court's execution. The Bank represented to the bankruptcy court that the "contract rate" for the original notes was its "published" prime rate plus one percent, even though it knew that this was not the bargain upon which the parties had agreed. The bankruptcy court was completely misled by the Bank's fraudulent representations.

The bankruptcy court's "Judgment Determining The Amount, Validity, And Extent Of The Bank's Lien," stated, relevant to consideration of the Bank's conduct, that:

> "Accrued interest on the loans, *determined by the Bank at the 'contract' rate* (good standing rate) to March 14, 1985 is $33,003,184.24. . . . " (Emphasis added) App. 13.

In making this finding of fact, the bankruptcy court relied on the Bank's fraudulent statement that the contract rate for the original notes was its "published" prime rate. The bankruptcy court's judgment was erroneously "based on the premise that it dealt with

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[21] "Article II: *Substantive Consolidation*: . . . As a result of substantive consolidation of the Debtors, all Claims between and among the Debtors are *eliminated* by this Plan, including without limitation, all pre-petition claims, *all claims*, if any, *relating to the ground lease* between Chopin and MCLP. . . . " (Emphasis added)

a published prime rate which they [the Bank] stated, in fact, it is their practice that they do publish it. . . . " Of course, the bankruptcy court's analysis of the law was wrong, and, in fact, the "contract" rate of the original notes was different from the Bank's "published" prime rate.

Fourth, the doctrine of "estoppel" should have acted as a bar precluding the Bank, as the plan's proponent, from alleging in the proposed reorganization plan that the "contract" rate was its "published" prime rate and that the amount of the outstanding loan was approximately *$234,342,743* as of March 14, 1985. The Petitioners were (a) forced to rely entirely upon the Bank as the lender for data concerning the amount of interest expense payable on the loans outstanding; (b) the facts concerning the amount of the loan outstanding and accrued interest based upon the "contract" rate were solely within the Bank's knowledge; and (c) no practical way existed for the Borrowers to investigate the Bank's representations and omissions without conducting an audit of the Bank's commercial loan portfolio for the purpose of determining the "minimum commercial lending rate charged from time to time by The Bank of New York for 90-day loans to responsible and substantial borrowers."

CONCLUSION

For the foregoing reasons, this Court should grant the writ and address the question of the application of the mootness doctrine in the administration of the bankruptcy laws for the purpose of resolving the conflict among the circuit courts of appeal.

Respectfully submitted,

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TABLE OF CONTENTS

Page

APPENDICES

A. Judgment of Eleventh Circuit Court of Appeals, entered on May 18, 1990.....App. 1

B. "Final Order" U.S. District Court (S.D. Fla.) entered on November 30, 1988.....App. 9

C. "Judgment Determining Amount, Validity, and Extent of Liens of the Bank of New York" U.S. Bankruptcy Court (S.D. Fla.) entered on March 21, 1985.....App. 11

D. "Confirmation Order" U.S. Bankruptcy Court (S.D. Fla.) entered on August 8, 1985.....App. 16

E. Letter Agreement between The Bank of New York and Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust dated October 10, 1985.....App. 22

F. "Order of Remand and Denial of Motion to Dismiss" U.S. District Court (S.D. Fla.) entered on December 30, 1985.....App. 25

G. Excerpts, Hearing on Remand, U.S. Bankruptcy Court (S.D. Fla.) heard by Judge Thomas C. Britton on January 18, 1986.....App. 46

H. "Motion to Require the Bank of New York to Furnish to the Liquidating Trustee the Minimum Commercial Lending Rate Charged From Time to Time by the Bank of New York for 90 Day Loans to Responsible and Substantial Borrowers, and for Other Relief" U.S. Bankruptcy Court (S.D. Fla.) dated December 17, 1986.....App. 49

TABLE OF CONTENTS – Continued

Page

I. "Complaint to Determine Amount, Validity and Extent of Lien" U.S. Bankruptcy Court (S.D. Fla.) dated February 1985.....App. 55

J. Article II, *Substantive Consolidation*, Amended Consolidated Plan of Reorganization filed on February 26, 1985 by the Bank of New York on behalf of Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation..... App. 83

K. Judgment of Eleventh Circuit Court of Appeals, case number 89-5862, entered on September 18, 1990.....App. 84

APPENDIX A

In re HOLYWELL CORPORATION, Debtor.

HOLYWELL CORPORATION,
Plaintiff-Appellant,

v.

BANK OF NEW YORK,
Defendant-Appellee.

No. 89-5028.

United States Court of Appeals,
Eleventh Circuit.

May 18, 1990.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, TUTTLE, and RONEY*, Senior Circuit Judges.

TUTTLE, Senior Circuit Judge:

This is an appeal from an order of the district court dismissing as moot an appeal from the bankruptcy court's decision determining the amount, validity and extent of a creditor's lien. Appellants primarily seek to challenge the interest rate used to calculate the amount of the lien.

I. STATEMENT OF THE CASE

Appellants are four Chapter 11 debtor companies and one individual Chapter 11 debtor, Theodore B.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Gould, who owns, controls or dominates the four companies. Appellee, the Bank of New York ("the Bank"), lent the debtors funds to finance the construction of a thirty-five story hotel, office and shopping complex in downtown Miami, Florida. The Bank's loans to the debtors amounted to over $196,711,481 and were secured by mortgages. When the loans fell into default, the Bank began foreclosure, and the debtors filed voluntary petitions for bankruptcy.

On February 11, 1985, the Bank, which is the debtors' largest secured creditor, filed an adversary proceeding to determine the amount, validity and priority of the Bank's lien against the debtors' property. The debtors moved for a stay of the adversary proceeding filed by the Bank, because of a prior pending action commenced by the debtors against the Bank in the district court, and for an order of withdrawal of the reference. The bankruptcy court denied both motions.

A hearing was held in the adversary proceeding on March 14, 1985. On March 20, 1985, the bankruptcy court issued a memorandum decision and entered a judgment fixing the total lien of the Bank to that date, including default interest from February 1, 1984, at $234,342,742.93. The bankruptcy court determined that "[a]ccrued interest on the loans, determined by the Bank at the 'contract' (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages." *Bank of New York v. Gould*, 49 B.R. 694 (Bankr.S.D.Fla.1985). The debtors filed a motion for rehearing, which the bankruptcy court denied. The debtors appealed to the district court but did not seek a stay pending appeal.

Meanwhile, the parties proposed competing reorganization plans. The five related or affiliated debtors submitted almost identical plans of reorganization. The plan offered by the Bank involved the Bank's purchasing the property with the improvements thereon for a sum of approximately $255,600,000. The creditors overwhelmingly approved the Bank's plan and rejected the debtors' plans. The bankruptcy court accepted the plan proposed by the Bank and entered a confirmation order on August 8, 1985. The debtors appealed the confirmation order to the district court and moved for a stay pending appeal. The bankruptcy court conditioned the issuance of a stay upon the debtors' posting of a supersedeas bond, which they failed to do. The reorganization plan proceeded, and the Bank (or its designee) purchased the Miami property for $255.6 million.

The district court remanded the appeal from the confirmation order to the bankruptcy court for additional explicit findings of fact and conclusions of law. On remand, an evidentiary hearing was held at which evidence was adduced relating to the calculation of the amount of the Bank's lien, among other matters. The bankruptcy court again confirmed the Bank's plan of reorganization. The district court affirmed. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D.Fla. 1986). On appeal to this Court, the case was eventually remanded to the district court to be dismissed as moot, because the reorganization plan had already been substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

As to the appeal to the district court from the bankruptcy court's order determining the amount, validity and priority of the Bank's lien, the district court dismissed the cause as moot on November 30, 1988, relying on the decision of *Miami Center*, 838 F.2d 1547. It is from this ruling that the debtors now appeal.

II. FACTS

As part of the reorganization plan, the Bank purchased the property for $255,600,000, by cancelling the judgment lien it held in the amount established in the adversary proceeding in the bankruptcy court, by releasing some $30,000,000 of cash collateral it received as a prior lender from the sale of certain properties in Washington, D.C., that had been owned by several of the debtors, and by furnishing the remaining new cash (somewhere between $11,000,000 and $14,000,000) necessary to make up the purchase price.

Additional facts prompting this litigation have been recited in numerous other decisions. *See, e.g., Miami Center Limited Partnership v. Bank of New York, supra,* and *Holywell Corp. v. Bank of New York,* 59 B.R. 340 (S.D.Fla.1986).

III. DISCUSSION

Appellants contend that the contract interest rate used to calculate the amount of the Bank's lien was excessive, because it was based on the Bank's published prime rate instead of the lower rate provided for in the contract. Appellants now seek to recover any excess,

which appellants assert is estimated at $14 million to $15 million.

Three of the notes made to the Bank, for $23,000,000, $47,500,000 and $42,000,000, defined the contract rate as follows:

> The prime rate is the minimum commercial lending rate charged from time to time by the Bank of New York for 90-day loans to responsible and substantial commercial borrowers.

Appellants contend that the bankruptcy court erroneously accepted the Bank's unilateral determination of the contract rate. The bankruptcy court stated in its order of judgment:

> Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

Appellants contend that the ruling of this Court regarding the mootness of the appeal of the confirmation order does not preclude recovery of overcharged interest expenses.

The plan of reorganization was adopted under the assumption that the Bank would be permitted to rely upon the amount of interest the bankruptcy court found to be correct. There is no indication that the Bank would have agreed to purchase the project for $255,600,000 if it had realized it might subsequently be required to repay millions of dollars of excess interest to the debtors. It

might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court. However, the amount of the judgment lien was calculated using that interest rate, and the purchase price of the property was funded in substantial part by elimination of the mortgage lien. Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the sale to the Bank, to which the Bank agreed.

This Court previously considered the debtors' allegation that the Miami property should be revalued to a higher figure and the sale price should be adjusted accordingly. *Miami Center,* 838 F.2d at 1555. The debtors recognized that the relief they sought could require the Bank to provide additional cash and "sweeten the pot." *Id.* at 1556. There, the Court stated:

> These prayers for relief must be set against what the bank bargained for, and received, as part of the reorganization plan, and the consequences to the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to $5 million-$6 million of interest at default rates. . . .
>
> Closing the sale to the bank stopped the running of interest at approximately $2 million per month. . . .
>
> * * *
>
> The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totalling approximately $30 million. The trustee appeared

> before the district court when, after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes.

838 F.2d at 1556. The Court further noted: "The bank might, of course, not wish to become purchaser of the property at an elevated price. . . . " *Id.*

More recently, in *In re Holywell Corp.*, 874 F.2d 780 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 725, 107 L.Ed.2d 744 (1990), several of the debtors contended that the bankruptcy court erred in concluding that title to furniture, fixtures and equipment (FF & E) passed to the liquidating trustee, who sold them to the purchaser as part of the $255.6 million sale. The Court stated:

> Passage of title of the FF & E to the liquidating trustee, however, was part of the confirmed plan of reorganization. We have already held that 'the plan ha[s] been substantially consummated . . . and that it ha[s] become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation.' The issue argued by appellants is therefore moot.

874 F.2d at 782 (citation omitted).

Here, the debtors again attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. Since the debtors failed to post an appeal bond, the reorganization plan was implemented; the plan has been substantially consummated. The debtors' efforts again to require the Bank to "sweeten the pot" after this principal transaction,

the sale of the property, has been completed must fail. The amount of interest established in the adversary proceeding in the bankruptcy court was included in the Bank's bargain for the purchase of the project, which constituted a large part of the confirmed plan. It is now impossible and unjust to amend the plan as consummated, and we are unable to fashion effective relief for all concerned, *see In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir.1981), *cited in Miami Center*, 838 F.2d at 1556. The district court properly dismissed the appeal as moot. We think the other contentions made by appellants are also without merit.

The order of the district court is AFFIRMED.

APPENDIX B

HOLYWELL CORPORATION, et al.,

Appellants,

v.

THE BANK OF NEW YORK,

Appellee.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-2263-CIV-ROETTGER

FINAL ORDER

(Filed Nov. 30, 1988)

_____/

THIS CAUSE is before the Court on Appeal by APPELLANTS, HOLYWELL CORPORATION, et al., of certain rulings made by the Bankruptcy Court.

Upon consideration of the record in this cause, and after hearing, it appears to the Court that this cause is controlled by the recent decision of *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, Case Nos. 87-1988 and 87-1989 (U.S. October 3, 1988). *See also Holywell Corporation v. Smith*, Case No. 88-151 (S.D.Fla. July 21, 1988).

WHEREFORE, and for the reasons stated, it is

ORDERED AND ADJUDGED that this cause is hereby DISMISSED, as moot.

DONE AND ORDERED this 30 day of Nov, 1988.

/s/ Norman C. Roettger, Jr.
UNITED STATES DISTRICT JUDGE
NORMAN C. ROETTGER, JR.

cc: counsel of record

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

IN RE: HOLYWELL CORPORATION, et al., Debtors.	CASE NOS. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
THE BANK OF NEW YORK a New York banking corporation, Plaintiff, vs. THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation, Defendants.	ADV.NO. 85-0160-BKC-TCB-A JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK (Filed March 21, 1985)

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chaper [sic] 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in

the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20th day of March, 1985.

/s/ Thomas C. Britton
UNITED STATES BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B. R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better.

The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million the debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditors' committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures

the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetiiton (sic) here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29.

(C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C.P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED at Miami, Florida, this 8th Day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX E

Fred Stanton Smith
Miami Center Liquidating Trustee
c/o Keyes Company Realtors
100 North Biscayne Boulevard
Miami, Florida 33131

October 10, 1985

The Bank of New York
48 Wall Street
New York, New York 10005

and

City National Bank of Miami, as Trustee
25 West Flagler Street
Miami, Florida 33130

RE: Miami Center

Gentlemen:

Reference is made to that certain Contract of Sale by and between The Bank of New York, as Purchaser and Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust and the Miami Center Liquidating Trust, as Seller bearing even date herewith (the "Contract").

Pursuant to the Contract the Seller has agreed to deliver to Purchaser at closing certain leases, books, records, keys, safe deposit box contents, plans manuals reports and other documents and items (the "Property"). Purchaser ad Seller have agreed to make certain adjustments to the purchase price pursuant to the Contract. It is understood, however that the Seller has not had sufficient access to the referenced premises and is unable to deliver certain items of Property and as a consequence of such

limited access also lacks information to make certain adjustments to the purchase price.

It is therefore agreed that any items of Property not delivered by Seller on the Miami Center Closing Date, as defined in the Contract, shall be delivered within forty five (45) days after the Miami Center Closing Date, unless Seller shall not have received possession of such items of property on the Effective Date or any time thereafter.

It is further agreed that in the event that any abatements, adjustments or apportionments under paragraphs 6(c), 9(d), 16(a) and (b) or other provisions of the Contract are not made or given as of the Miami Center Closing Date by reason of the fact that final or liquidated amounts have not been ascertained, or are not available as of such date, the Purchaser and Seller shall make such abatements, apportment or adjustment promptly when the final or liquidated amounts are ascertained. All abatements, prorations and adjustments shall be made utilizing hotel and office building industries generally acceptable accounting procedures as used by Certified Public Accountants in Dade County, Florida, and shall be completed within forty five (45) days of the Evective Dade, as much term is used in the Contract.

It is further agreed that the amount of interest on the loans made to MCLP and Chopin (as such terms are defined in the Contract) taken as a credit pursuant to paragraph 4 of the Contract shall be subject to review by the Liquidating Trustee and the Bank for 45 days after the Effective Date (as such term is defined in the Contract) and, in the event that such review reveals any mathematical errors, then such interest amount shall be adjusted,

said adjustment, if any, to occur within said 45-day period.

Very truly yours,

By Fred Stanton Smith
Fred Stanton Smith, as
Liquidating Trustee for and
on Behalf of the Miami
Center Liquidating Trust
MIAMI CENTER LIQUIDATING
TRUST

By Fred Stanton Smith
Fred Stanton Smith, as
Liquidating Trustee for and
on behalf of the Miami
Center Liquidating Trust

The Undersigned hereby consents and agrees to the terms of this letter.

THE BANK OF NEW YORK.

By /s/ Douglas Duval
Vice-President

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3225-Civ-Aronovitz
Bk. Nos: 85-01590-BKC-TCB
85-01591-BKC-TCB
85-01592-BKC-TCB
85-01593-BKC-TCB
85-01594-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,
Appellants/(Debtors),

vs.

BANK OF NEW YORK,
Appellee/(Principal Creditor).

ORDER OF REMAND AND DENIAL OF MOTION TO DISMISS

This is an appeal from Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of Florida. Appellants (five) Chapter 11 debtors in the proceeding below, appeal from two orders of the bankruptcy judge:

a.) an order approving the substantive consolidation of the debtors' estates; and,

b.) the trial court's order confirming the plan or reorganization proposed by the Bank of New York, the major creditor of the debtors' estates and the appellee herein.

Both rulings are intertwined and interdependent. Also before the Court are two motions filed by the appellee and by the liquidating trustee appointed under the confirmed plan which seek to dismiss this appeal on the grounds of mootness.

The five debtors who initiated the Chapter 11 proceedings below and those estates were consolidated by order of the Bankruptcy Judge, Thomas C. Britton are:

> Miami Center Limited Partnership (hereinafter "MCLP"), which developed the Miami Center Project;
>
> Chopin Associates, the owner of the land, leased to MCLP, upon which the facility was built;
>
> Holywell Corporation, an entity involved in servicing and holding real property;
>
> Miami Center Corporation, a subsidiary of Holywell Corporation; and
>
> Theodore B. Gould, the sole shareholder of Holywell Corporation, president of the Miami Center Corporation, and a general partner of both Chopin Associates and the Miami Center Limited Partnership.

The Bank of New York, the appellee, was the primary secured creditor of the debtors, having advanced over Two Hundred Million ($200,000,000) Dollars in mortgage loans for the purchase and construction of the Miami Center Project.

Involved in these proceedings, among other assets of the debtors and the claims of various other creditors, is property known as the Miami Center, situated at a bayfront site in downtown Miami, Florida (roughly South of Bayfront Park). The Miami Center, the debtors' major

asset, consists of a modern 35-story hotel (The Pavillon) and office building structure (Edward Ball Building) with two towers joined by a restaurant and shopping complex known as the Podium. The hotel and office facilities were furnished with furniture, fixtures and equipment (FF&E) which were leased from some affiliated creditors of the debtors. Construction and management of the Miami Center was the responsibility of MCLP. (Four additional vacant lots (blocks) adjacent to the debtors' property are owned by the Miami Center Joint Venture, which is not a debtor in these proceedings. Thus, these four blocks were not included in the debtors' estates for purposes of reorganization.)

HISTORY OF THE CHAPTER 11 PROCEEDINGS

Due to substantial disagreements among the five debtors and the Bank of New York over the priority to be given to the latter's mortgage loans vis-a-vis subsequent financing arrangements made by the debtors, the Bank declared its mortgage loans secured by the Miami Center property to be in default in early 1984, and filed foreclosure proceeding [sic] against the property on July 27, 1984. All five debtors thereupon filed petitioners under Chapter 11 of the Bankruptcy Code in the court below. Between the initial filing of those petitions on August 22, 1984 and the issuance of the court's final order of confirmation on August 8, 1985, Judge Britton considered and ruled upon a myriad of motions and other matters, as can be seen by the voluminous record before this Court on appeal. Appellants here challenge the bankruptcy court's rulings on two of the most significant of these rulings:

1. The July 23, 1985 Order Approving the Substantive Consolidation of the Debtors' Estates (Court Paper #840).[1]

2. The August 8, 1985 Final Order of Confirmation, confirming the plan of reorganization of the appellee Bank of New York (Court Paper #906).

The major components of the plan approved by the court below are as follows:

– The Bank would acquire the entire Miami Center Project Property, including the furniture, fixtures and equipment (FF&E) for the sum of Two Hundred Fifty-Five Million, Six Hundred Thousand ($255,600,000) Dollars. (This figure is based on a valuation of the property performed by Charles V. Failla & Associates and commissioned by the Bank of New York. Appellants contest the validity of this appraisal and the fact that the court below did not hold hearings thereon.) This acquisition would be funded through the net amount already owed to the appellee by the debtors – approximately Two Hundred Forty Million ($240,000,000) Dollars – to which would be added Thirty Million ($30,000,000) Dollars realized through the sale

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[1] Substantive consolidation, in the context of a Chapter 11 proceeding, entails much more than the mere procedural consolidation contemplated by *Fed.R.Bankr.P.* 1015. As the advisory committee note to that rule explains, the substantive combination of the estates of various debtors is only sometimes appropriate, depending upon the factual circumstances of the case. Substantive consolidation has been defined as an equitable remedy in which "the assets or liabilities of different entities are consolidated and dealt with as if the assets were held by, and the liabilities incurred by, a single entity." *Matter of Luth*, 28 B.R. 564, 566 (D. Idaho 1983), *citing* 5 Collier on Bankruptcy, p. 1100-32, (15th Ed. 1980).

by debtors Holywell and Gould of certain unrelated, distinct real property in Washington, D.C. This latter sum of Thirty Million ($30,000,000) Dollars has been held and maintained as additional collateral by the Bank in a separate collateral account. (See Judge Britton's Order of December 31, 1984. Court Paper #303.)

– The liquidating trustee, to be appointed under the Plan, would have effective control over the operations of the Miami Center, ousting the debtors in possession. In addition, the trustee would be required by the terms of the Plan to voluntarily dismiss the civil suit filed by the debtor/appellants in this Court, Case No. 85-0228-Civ-Hoeveler, which sought damages against appellee for breaches of its loan agreements, violations of the federal RICO statute, and other actions.

– The Bank would set aside Fifteen Million ($15,000,000) Dollars, backed by surety bonds, for two creditors who had leased the equipment and fixtures to the MCLP. (The ruling is under separate appeal by the Bank of New York in this Court before the Honorable C. Clyde Atkins who required this sum in the nature of a Supersedeas Bond.)

– The claims of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing Company, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to those of other creditors with lower priority on the grounds these creditors were "insiders".

– The Bank's Plan further required the substantive consolidation of the estates of the five debtors/appellants. *See* f.n.[1], *supra.*

The substance of the two orders appealed from by the debtors is discussed below. (In actuality the Order

approving Plan of Reorganization includes inferentially the effect of the Order of Substantive Consolidation.) Attached to this opinion for reference is a copy of each of these Orders, as well as an excerpt from the transcript of the hearing on substantive consolidation held before Judge Britton on July 18, 1985, which can be deemed to supplement the judge's two-page Order on Substantive Consolidation entered on July 23, 1985.

THIS SCOPE OF REVIEW AND NECESSITY OF ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is settled beyond dispute that a district court in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of Americana*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *Matter of Multiponis*, 622 F.2d 709, 713 (5th Cir. 1980). There is authority holding that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *Watson v. Thompson*, 456 F.Supp. 432, 436 (S.D. Ga. 1978).

The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceeding below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of

each case. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 432 (5th Cir. 1977). The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. *See Fed. R. Civ. P. 52(a).* Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed.R.Bankr.P.* 7052,[2] which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation at issue here were *adversary* proceedings as that term is defined in *Fed.R.Bankr.P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed.R.Civ.P.* 52(a) are nonetheless applicable to the instant appeal.

Fed.R.Bankr.P. 9014 extends the application of Rule 7052 to "contested matters" and encompasses, (*See* Advisory Notes to Rule 9014), the debtors' objections to the trial court's order on substantive consolidation. The appellants' objection to the final order of confirmation is explictly made subject to Rule 9014 by *Fed.R.Bankr.P.* 3020(b). Thus, the Bankruptcy Judge should have made

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[2] Rule 7052 has not been affected by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (July 10, 1984), and is widely cited by courts in their most recent decisions in the bankruptcy area. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985); *In Re Fossum*, 764 F.2d 520 (8th Cir. 1985); *Judson v. Levine*, 50 B.R. 587 (S.D. Fla. 1985).

and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review. Actually, findings and conclusions are almost nonexistent or absent, and to such extent that in this case this Court does not consider that review by discarding the "clearly erroneous" standard and proceeding *"de novo"* should be undertaken.

THE GROUNDS OF THE DEBTORS' APPEAL

In their appeal to this Court, the appellants state the following substantive grounds for their appeal:

1.) that the equitable subordination of the claims of creditors Miami Center Joint Venture, Holywell Leasing Co. and Holywell Telecommunications Co. was error, both substantively (since their leases were determined to be "true leases", thus meriting their treatment as outside creditors) and procedurally (since no hearing was held on the subject of equitable subordination).

2.) that the substantive consolidation of the estates of the five debtors was error, in that the Bank of New York failed to carry its burden of proving the necessity of such consolidation and because two of the five debtors were solvent at the time of the bankruptcy court's order.

3.) that the bankruptcy court's failure to hold a hearing on the validity of the valuation of the Miami Center project which the Bank of New York submitted was reversible error.

4.) that the bankruptcy court's action in upholding that portion of Bank's plan which directs the liquidating trustee to dismiss the debtors' pending civil suit against the appellee is unconstitutional in that it allows a non-Article III court to remove a case from the jurisdiction of this court.

5.) that the Bank's plan, as confirmed by the bankruptcy court, unfairly discriminates against certain equally situated unsecured creditors by favoring one (i.e. Holywell Corporation) in violation of 11 U.S.C. 1129(b).

6.) that the approved plan wrongly subordinates the claims of certain mechanics and materialmen.

7.) that the bankruptcy court denied the debtors due process by refusing their requests for hearings on various amendments to the Bank's proposed plan of reorganization and for adequate disclosure by the Bank of such amendments.

As to each of these grounds, this Court has been left with the impeded, if not impossible, task of trying to apply a "clearly erroneous" standard of review to findings of fact that are either non-existent or too vague to support adequate review. As the Fifth Circuit noted in *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975), "findings that are nothing more than broad general statements, stripped of underlying analysis or justification shedding some light on the reasoning employed, makes it impossible for [an appellate court] to give meaningful review to the judgment." *Id.* at 207. For example, in his order approving the substantive consolidation of the debtors' estates, the bankruptcy judge supported his ruling with

the following statement: "The Court finds that the legal relationships among the debtors and the facts in this record support the substantive consolidation of the estates . . . " Order of July 23, 1985 (Court Paper #840. (*See* Appendix A.)

In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. The plan consists of many complex provisions, some of which form the basis of this appeal. Yet, in his five page order approving this complicated plan which would determine the disposition of over Three Hundred Million ($300,000,000) Dollars in assets, the bankruptcy court provided no more explanation of its decision to approve the plan than a statement that the plan "meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b)." Final Order of Confirmation, dated August 8, 1985 (Court Paper #906). In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these order [sic] was required.

To support its order of substantive consolidation, for instance, the trial court would have had to find the existence of certain, widely accepted factors which justify this extraordinary remedy which, if employed inappropriately, can result in unfair treatment of both debtors and creditors. *In re Flora Mir,* 432 F.2d 1060 (2nd Cir. 1970). Those factors are set out in *In Re Donut Queen,* 41 B.R. 706, 709 (S.D.N.Y. 1984) and include the following:

1. The presence or absence of consolidated financial statements.

2. The unity of interests and ownership between the various corporate entities.

3. The existence of parent and intercorporate guarantees on loans.

4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.

5. The commingling of assets without formal observance of corporate formalities.

6. The commingling of assets and business functions.

7. The profitability of consolidation at a single physical location.

In the same manner, a bankruptcy court, before it can justly order the equitable subordination of otherwise prior claims must first find that the following three tests are satisfied:

1. The claimant must have engaged in some type of inequitable conduct.

2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.

3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Matter of Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977).

It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this

court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court. Faced with the same situation, (lack of adequate findings of fact on appeal from an order of equitable subordination), the Fifth Circuit Court in *Matter of Missionary Baptist Foundation of American Inc.*, 712 F.2d 206 (5th Cir. 1983) remanded the matter to the bankruptcy court, explaining that "we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the [appellee] has discharged his burden of proof thereunder." *Id.* at 212.

The Court fully acknowledged that a trial judge, in ruling on a matter governed by the requirements of *Fed.R.Civ.P.* 52, is not held to any formalistic style in preserving his findings, such as numbered paragraphs. All that is required is that the factual and legal basis of every significant ruling be stated in a clear and understandable manner which permits the reviewing court to fairly decide any appeal which may emanate from that ruling. The record before this Court in this instant appeal fails to meet this standard.

There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded. It seems evident that whenever necessary, upon remand, the bankruptcy court should review and consider the advisability of holding additional evidentiary hearings. At the very least, the bankruptcy court should require each party to list, in writing, any further evidentiary hearings they deem to be necessary. The

bankruptcy judge can then review these requests to determine and then hold evidentiary hearings on any such requests

It is therefore

ORDERED AND ADJUDGED that this matter be, and the same is, hereby REMANDED to the United States Bankruptcy Court for the Southern District of Florida, to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits. This should all be accomplished WITHIN THIRTY (30) DAYS herefrom.

THE DEBTORS' APPEAL IS NOT SUBJECT TO DISMISSAL FOR MOOTNESS

Earlier in this opinion, the Court examined the substantive elements of this appeal and the necessity of a remand to the bankruptcy court for the complete findings of fact and conclusions of law required by the applicable rules of procedure. The Court's discussion of those substantive issues makes it clear that the debtors' appeal is not a frivolous one and that, absent compelling cause, the interests of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below.

The debtors made several efforts to obtain a stay of the bankruptcy's court's orders pending the outcome of this appeal. The bankruptcy court, in its order of September 27, 1985, agreed to grant such a stay on the condition that the debtors post a supersedeas bond in the amount

of One Hundred Forty Million ($140,000,000) Dollars. The debtors thereupon took an emergency appeal to this Court from the bankruptcy court's stay order. The appeal was heard by Chief Judge James Lawrence King, who affirmed the bankruptcy court's grant of a stay, but reduced the amount of the supersedeas bond required to Fifty Million ($50,000,000) Dollars to be posted on or before October 10, 1985. Appellants then took an appeal from the district court's order to the Eleventh Circuit Court of Appeals, which appeal was dismissed by that court for lack of jurisdiction on October 9, 1985. Upon the debtors' failure to post the required bond, the bankruptcy court's stay terminated on October 10, 1985.

The Bank of New York, appellee in this cause, has moved to dismiss the appeal of Holywell Corporation and the other appellants on the ground that their appeal has been rendered moot by the appellants' failure, after several attempts, to obtain a stay of the implementation of the confirmation order pending this appeal. (A similar motion has been filed by the liquidating trustee, who is not a party to this appeal.) The appellee bases its motion to dismiss upon the "mootness doctrine" first codified in former Bankruptcy Rule 805 and followed by a significant number of decisions by courts throughout the United States. Rule 805 states, in pertinent part:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

Fed.R.Bankr.P. 8005, which replaced Rule 805 in 1983, does not contain any reference to the mootness standard of the previous rule. While that standard is preserved in the current bankruptcy code at 11 U.S.C. § 363(m), this statute applies the mootness doctrine only to the sale of the debtor's property by the trustee or the debtor himself. Where, as here, the debtors' assets have been sold by the liquidating trustee, § 363(m) is not applicable.

In the absence of a controlling statutory standard, this court must look to the applicable case law for guidance, as the Eleventh Circuit Court of Appeals did in *In Re Sewanee Land, Coal and Cattle Company*, 735 F.2d 1294, 1296 (11th Cir. 1984). A survey of recent decisions regarding bankruptcy appeals filed without procurement of a stay of the proceedings below shows that the "mootness doctrine" stated by former Rule 805 is still widely accepted by courts throughout the United States. *See e.g., Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Sewanee Land, Coal and Cattle Co., supra; In Re Bel Aire Associates*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen v. Community Savings Bank*, 656 F.2d 1 (1st Cir. 1981). In each of these cases, however, the trial court order from which an appeal was taken was one approving the sale of the debtor's property. Indeed, the text of former Rule 805, to which these decisions refer, is specifically directed to "an order approving a sale of property." Where a bankruptcy court's order concerns matters other than the sale of property, the mootness doctrine may not apply. Thus, in *In Re Berg*, 45 B.R. 899 (Bankr. App. 1984), the Bankruptcy Appellate Panel of the Ninth Circuit ruled that the mootness standard embodied in former Rule 805 did not apply to an appeal from an order quieting title in the

debtor's property, even where such property had been sold by the trustee and the proceeds distributed.

In an earlier decision, the Court of Appeals for the Ninth Circuit held that where a debtor appeals from several orders of the bankruptcy court, some of which are orders approving the sale of property, the debtor may appeal those orders not involved with the sale even in the absence of a stay. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). While the *Combined Metals* court considered appeals from ten separate orders of the bankruptcy court, Holywell Corporation and the other appellants before this Court appeal from only two orders issued by Judge Britton in the proceedings below: the July 23, 1985 Order Approving Substantive Consolidation, and the Final Confirmation Order entered on August 8, 1985.

The order regarding substantive consolidation is clearly not one approving a sale of property; rather, it requires that the estates of the five debtors be combined to facilitate payments to their creditors. Should this court rule, after remand of this matter, in favor of the appellants on their appeal from the consolidation order, it can grant meaningful relief to the appellants by reversing the order, and that portion of the confirmed plan of reorganization which incorporates this order. For these reasons, the debtors' appeal of the bankruptcy court's order approving substantive consolidation is not moot, and will be decided by this court on its merits upon receipt of the findings of fact and conclusions of law ordered from the bankruptcy court.

The greater part of the present appeal concerns the Final Order of Confirmation and specific aspects thereof: the equitable subordination of certain creditors' claims, the requirement that the liquidating trustee dismiss the appellants civil suit, the validity of the estate valuation upon which the plan is based, and alleged procedural deficiencies in the conduct of the confirmation proceedings. Of course, the heart of the confirmed plan is the sale, *by the liquidating trustee*, of the Miami Center property for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand ($255,600,000) Dollars. The appellee contends that Judge Britton's order confirming the Bank's Plan of Reorganization, and hence this sale, is shielded from appellate review by the "mootness doctrine" of Rule 805 and the applicable case law.

The touchstone of those decisions, and of all determinations that a given suit or appeal is moot, is not the presence or absence of a single factual element (e.g., a sale of property). Rather, the fundamental criterion for judging whether a case on appeal has become moot has consistently been whether the appellate court has been rendered incapable of granting effective relief to a petitioner due to a change in the circumstances of the case. *Mills v. Green*, 159 U.S. 651, 16 S. Ct. 132 (1895).

In the appeal before this court, the parties have informed the court that certain transactions have already taken place in accordance with the confirmation order issued below. The Miami Center property has been transferred by the liquidating trustee *to a designee of the appellee*, and certain claimants in classes three through six of the reorganization plan have been paid. The appellants, however, have frequently stated their approval of the

payments made to such third-party creditors, and their intention that such claimants be satisfied regardless of the dispute between themselves and the appellee. This appeal is primarily directed at recovering title to the Miami Center property held by the Bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above.

A crucial determination to be made is whether, accepting various actions have been taken by the liquidating trustee in reliance on the bankruptcy court's confirmation order, can effective relief be granted to the appellants should this Court decide, after the appeal is reinstated post-remand, that their appeal has merit? In determining that it is capable of granting such relief, this court has considered each of the points raised by the present appeal.

Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc., would likewise return these entities to their pre-confirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to "arm's length" creditors. Denial of the liquidating trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, and review of the alleged procedural flaws in the valuation and other proceedings below would, at most, necessitate further hearing on those matters. Thus, the posture of this appeal, at least as it concerns the points of appeal discussed here, is by no means such that events have rendered meaningful review impossible.

Finally, and most significantly, should this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone. The property was sold *not* to a disinterested, third-party purchaser, but to the appellee itself, through its designee, for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand ($255,600,000) Dollars. This purchase price was satisfied by the Bank by combining the debtors' outstanding mortgage obligations to the Bank with Thirty Million ($30,000,000) Dollars in cash collateral which was derived through a sale, by the debtors, of certain Washington, D.C. property. Much of this latter cash fund has already been applied to pay the claims of certain secured creditors, which use the appellants have approved. Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million ($30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of reorganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor

approval for an alternate plan while seeking a buyer for the Miami Center which would be willing to pay what the debtors contend is the property's true value.

This Court may ultimately reject the appeal presented by the debtors and uphold the bankruptcy court's orders on substantive consolidation and confirmation of the Bank of New York's plan. Today's opinion merely constitutes the court's determination that the appeal is a viable one, and that the court, should it determine that the appellants' request relief, or other suitable remedy, is appropriate, would be able to grant it. Before any determination of the merits of this appeal can be made, however, the court must await the result of its remand of this matter to the trial court for his provision of findings of fact and conclusions of law which will enable this court to make a fair and informed judgment of the merits of the appeal.

For the foregoing reasons, it is

ORDERED and ADJUDGED that the appellee's motion to dismiss be, and the same is, hereby DENIED.[3]

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[3] There are several other appeals now pending in the United States District Court from the bankruptcy judge's rulings. These are before other judges, including two before Senior United States District Judge C. Clyde Atkins, and another before United States District Judge William Hoeveler.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 30 day of DECEMBER 1985.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

Copy furnished to:

S. Harvey Ziegler, Esq.
Thomas F. Noone, Esq., (New York, N.Y.)
Vance E. Salter, Esq.
Fred H. Kent, Esq.
Raymond W. Bergan, Esq (Wash., D.C.)
Irving M. Wolff, Esq.

APPENDIX G

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

In the Matter of HOLYWELL CORPORATION, et al., Debtors.	NO. 84-01590

HEARING ON REMAND

January 18, 1986

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Saturday, January 18, 1986, and the following proceedings were had:

Reported By: Janice Mauldin

* * *

(p. 15) Q In doing your interest calculation, Mr. Denkhaus, did you use the interest rate which was used by the Bank of New York?

A Yes, I did, and I would like to point out that there is an uncertainty involving three of the earlier notes relating to the definition of the Bank of New York's prime rate in those three notes.

MR. ZIEGLER: Your Honor, I am going to object at this point. I think the gentlemen [sic] is about to testify on legal issues and interpretation of the term "prime rate" –

MR. BERGAN: Quite the contrary –

THE COURT: One at a time, please, Mr. Bergan.

Are you finished?

(p. 16) MR. ZIEGLER: Yes, your Honor.

THE COURT: Mr. Bergan?

MR. BERGAN: I think Mr. Denkhaus is about to say that he didn't attempt to resolve that and that he used the rate used by the Bank of New York.

THE COURT: Well, whatever Mr. Denkhaus is going to say, I will overrule the objection. Here again, without intending to repeat it constantly, I am going to allow this certified public accountant to express views and opinions even though they may invade the prerogative of a court or of attorneys. The weight to be given his testimony is, of course, an entirely different matter.

Do you want the question repeated to you, Mr. Dekhaus [sic]?

THE WITNESS: Yes, please.

(Thereupon, the previous question and partial answer were read by the reporter.)

A (Continuing) Yes, and I would just like to continue on with that. It is a legal issue and it is one which I am not qualified to make a decision whether the Bank of

New York prime rate is the one that was used by the Bank of New York or (p. 17) whether it is another rate. I just wanted to point out that, because of this uncertainty, we requested additional information from the Bank of New York to define what the prime rate is in accordance with the language that is specified in those three notes, and that until that is resolved we cannot finalize our report on this interest computation.

Q (By Mr. Bergan) I just wanted to make clear that, in making your calculations, Mr. Denkhaus, you used the actual percentage number that had been applied by the Bank of New York?

A Correct.

* * *

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	:	Chapter 11
HOLYWELL CORPORATION, et al.,	:	Cases Nos. 84-01590-BKC-TCB
Debtors.	:	84-01591-BKC-TCB 84-01592-BKC-TCB
	:	84-01593-BKC-TCB 84-01594-BKC-TCB
_____	:	

MOTION TO REQUIRE THE BANK OF NEW YORK TO FURNISH TO THE LIQUIDATING TRUSTEE THE MINIMUM COMMERCIAL LENDING RATE CHARGED FROM TIME TO TIME BY THE BANK OF NEW YORK FOR 90-DAY LOANS TO RESPONSIBLE AND SUBSTANTIAL BORROWERS, AND FOR OTHER RELIEF

COMES NOW the Liquidating Trustee, Fred Stanton Smith, by and through his undersigned counsel, and moves this Honorable Court to enter its Order directing The Bank of New York to furnish to the Liquidating Trustee, on behalf of the Miami Center Liquidating Trust (the Trust), the minimum commercial lending rate charged by The Bank of New York for 90-day loans to responsible and substantial borrowers (the minimum commercial rate), and for other ancillary relief, including but not limited to requiring The Bank of New York to render an accounting to the Liquidating Trustee, and to pay to the Trust any sums due in conjunction with such accounting, and in support thereof does show:

1. That The Bank of New York's Amended Consolidated Plan of Reorganization was confirmed by this Court on August 8, 1985 (the confirmed Plan), and became effective on October 10, 1985.

2. In conjunction with the sale and transfer of property provided for in the confirmed Plan, The Bank of New York received credit against the purchase price, for interest to and including October 9, 1985, in the amount of $46,016,441.49. This credit is an overcharge since it is not based on the minimum commercial rate charged on three of the promissory notes involved, the $42 million note, the $47.5 million note, and the $23 million note. If a calculation is made on the minimum commercial rate, the Liquidating Trustee is entitled to some $14 or $15 million in credits.

3. The Bank of New York has refused and continues to refuse to make available to the Trust its minimum commercial rate for the period the said three notes were outstanding, i.e., June 19, 1979 through and including June 19, 1985, though the Liquidating Trustee on behalf of the Trust has made demand upon The Bank of New York, through the Trust's accountants and personally, to supply the same.

4. The Bank of New York wrongfully maintains that the releases executed by the Debtors on June 23, 1983 and June 11, 1984 absolve the Bank from supplying this information. The said releases do not relieve the Bank. Copies of said releases are attached hereto and made a part hereof as Exhibit A.

5. The Bank of New York further contends that this Court's Judgment of March 20, 1985, a copy of which is

attached hereto and made a part hereof as Exhibit B, determines the amount, validity and extent of the Bank's lien and allows a per diem interest charge of $75,320.16. It is reservedly called to this Court's attention that while the three notes involved call for a minimum commercial lending rate, The Bank of New York failed to calculate the said proper rate of interest and the sums contained in said Judgment of March 20, 1985, as prepared for this Court's execution, include an erroneous calculation of interest on said three notes, i.e., interest calculated and charged was prime rate. Annexed hereto and made a part hereof as Exhibit C is the Affidavit of James E. Hamilton, Vice President of The Bank of New York attesting to the procedure used to compute the prime rate of interest.

6. This Court in its Judgment of March 20, 1985 reserved jurisdiction of this matter in the following language:

> 14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

However, the said March 20, 1985 Judgment is under appeal, and this Court may have been divested of jurisdiction to grant such further relief as may be necessary and proper in connection with amending or modifying the Judgment of March 20, 1985, but it still retains jurisdiction to direct The Bank of New York to supply to the Trust the minimum commercial rate in connection with the aforesaid three notes for the period from June 19, 1969 through October 9, 1985.

7. The Liquidating Trustee was reserved the right at the closing to review the interest charged on the three

notes involved. Attached hereto and made a part hereof as Exhibit D is a letter dated October 10, 1985 executed by The Bank of New York and the Liquidating Trustee as such Trustee and for and on behalf of the Trust.

8. The Confirmation Order, which became effective on October 10, 1985, created new entities which survive the Chapter 11 proceedings (11 U.S.C §1101(2)), and in fact said entities are involved in matters over which this Court did not retain jurisdiction. Annexed hereto and made a part hereof as Exhibit E is a copy of the provisions of the confirmed Plan which deal with the retention of jurisdiction.

9. The matters and things raised post-consummation may be within this Court's jurisdiction, since the interest question is a portion of the issue for adjustments post-closing and post-confirmation and -consummation. The limitations on this Court's jurisdiction, as set forth in Exhibit E, supra, creates an uncertainty in the Liquidating Trustee's position as to whether or not this Court has inherent jurisdiction over the subject matter, or has limited jurisdiction over the subject matter.

10. In view of the foregoing, the Liquidating Trustee on behalf of the Trust files this motion to afford this Court an opportunity to determine if it does in fact have jurisdiction to grant the relief sought. Should this Court determine it does not have jurisdiction, or that it wishes to abstain, then in that event, the Liquidating Trustee would seek relief in a court of competent jurisdiction.

WHEREFORE, your movant prays that if this Court exercises its jurisdiction it will direct The Bank of New York to furnish to the Trust, in connection with the three

notes involved, the minimum commercial lending rate charged by The Bank of New York for 90-day loans to responsible and substantial borrowers during the period from June 19, 1979 through and including October 9, 1985, so that the Liquidating Trustee can make a determination as to whether or not the rates of interest charged by The Bank of New York for which it took credit were proper; if any credits are due to the Trustee, that The Bank of New York be required to render an accounting to the Liquidating Trustee for said sums and be required to pay and discharge any obligations due and owing; or in the alternative, that the Court abstain in the matter because a post-confirmation and -consummation transaction is involved, over which it did not retain jurisdiction, and permit the Liquidating Trustee to pursue any and all appropriate causes of action in a court of competent jurisdiction.

HOLLAND & KNIGHT
Attorneys for Liquidating Trustee
1200 Brickell Avenue
Post Office Box 015441
Miami, Florida 33101
(305) 374-8500

By Irving M. Wolff
IRVING M. WOLFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were this 17th day of December, 1986 mailed to Fred H. Kent, Jr., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, 1400 Florida National Bank Building, 225 Water

Street, Jacksonville, Florida 32202; Vance E. Salter, Steel, Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131; S. Harvey Ziegler, Kirkpatrick & Lockhart, 1428 Brickell Avenue, Miami, Florida 33131; Raymond Bergan, Williams & Connolly, 839 Seventeenth Street, N.W., Washington, D.C. 20006; John W. Kozyak, Kozyak, Tropin & Throckmorton, 2850 Southeast Financial Center, Miami, Florida 33131; Thomas F. Noone, Esq., 48 Wall Street, New York, New York 1005 [sic]; Albert I. Edelman, Esq., 1211 Avenue of the Americas, New York, New York 10036.

/s/ Irving M. Wolff
IRVING M. WOLFF

APPENDIX I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

IN RE: HOLYWELL CORPORATION, et al., Debtors.	
THE BANK OF NEW YORK, a New York banking corporation, Plaintiff, vs. THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP: and HOLYWELL CORPORATION a Delaware corporation, Defendants.	CASE NOS. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB ADV. NO. COMPLAINT TO DETERMINE AMOUNT, VALIDITY AND EXTENT OF LIEN

The Plaintiff, The Bank of New York (the "Bank"), by and through its undersigned counsel, sues the defendants, and alleges as follows:

1. This is an adversary proceeding to determine the amount, validity and extent of liens against the Debtors' property, filed pursuant to 11 U.S.C. § 362 and Bankruptcy Rule 7001.

2. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334.

3. The Bank is a New York corporation and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

4. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

5. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

6. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984 (the "Date of Filing").

7. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements on a certain parcel of real estate located in Miami, Dade County, Florida (hereinafter called "Miami Center Phase I").

8. Pursuant to the certain loan agreements referred to in paragraphs 21(a)(m) and 22(A)(1) hereof, the Bank advanced funds to MCLP and Chopin in the principal amount of $195,086,027.03 to finance the cost of the land acquisition and construction of Miami Center Phase I which loans are evidenced by the notes and agreements described in paragraphs 21(A) and 22(A) hereof and are subject to the guarantees of Holywell, Gould and MCC as set forth in paragraphs 23(A), 24(A) and 25(A) respectively.

9. The total principal amount of all the indebtedness due to the Bank from the Debtors as a group in connection with the financing referred to in paragraph 8 hereof amounts to $196,711,481.78 and accrued and unpaid interest thereon to the Date of Filing amounts to $21,181,862.96. This indebtedness is secured by *inter alia* the collateral described in paragraphs 29(A) and (B) hereof. In addition, the Debtors are liable to the Bank for costs and expenses incurred in connection with the Loan to the Date of Filing in the approximate sum of $831,563.72.

10. The Debtors are indebted to the Bank as set forth in the following paragraphs.

11. *MCLP.* MCLP was on the Date of Filing, and still is indebted (or liable) to the Bank in the sum of $218,724,908.46 consisting of the following amounts:

(A) loan indebtedness in the principal sum of $172,086,027.03 plus interest accrued thereon to the Date of Filing in the sum of $18,748,102.04.

(B) guarantee indebtedness in the principal sum of $23,000,000.00 plus interest accrued thereon to the Date of Filing in the sum of $2,348,236.11, and

(C) loan indebtedness in the nature of overdrafts in the principal sum of $1,625,454.55 plus interest thereon to the Date of Filing in the sum of $85,524.81, and

(D) costs and expenses to the date of the Date of Filing in the approximate sum of $831,563.72.

12. *CHOPIN.* Chopin was on the Date of Filing, and still is indebted (or liable) to the the Bank in the sum of $218,724,908.46 consisting of the following amounts:

(A) loan indebtedness in the principal sum of $105,586,027.03 plus interest accrued thereon to the Date of Filing in the sum of $12,115,261.75.

(B) guarantee indebtedness in the principal sum of $89,500,000.00 plus interest accrued thereon to the Date of Filing in the sum of $8,981,076.40, and

(C) loan indebtedness in the nature of overdrafts in the principal sum of $1,625,454.55 plus interest thereon to the Date of Filing in the sum of $85,524.81, and

(D) costs and expenses to the Date of Filing in the approximate sum of $831,563.72.

13. *HOLYWELL.* Holywell, was on the Date of Filing, and still is indebted (or liable) to the Bank in connection with the indebtedness described in paragraphs 11

and 12 hereof in the sum of $133,068,831.86, consisting of the following amounts:

(A) guarantee of loan indebtedness in the outstanding principal sum of $105,586,027.03 plus interest accrued thereon to the Date of Filing in the sum of $12,115,261.75,

(B) guarantee of completion indebtedness, the cost of said completion being in the minimum amount of $12,825,000,

(C) overdraft indebtedness in the principal sum of $1,625,454.55 plus interest thereon to the Date of Filing in the sum of $85,524.81, and

(D) costs and expenses of the Bank to the date of the filing of the petition in the approximate sum of $831,563.72.

14. *GOULD.* Gould was on the Date of Filing, and still is indebted (or liable) to the Bank in connection with the indebtedness described in paragraphs 11 and 12 hereof in the sum of $135,052,043.66, consisting of the following amounts:

(A) guarantee of loan indebtedness in the outstanding principal sum of $107,336,027.03 plus interest accrued thereon to the Date of Filing, in the sum of $12,348,473.55,

(B) guarantee of completion indebtedness, the cost of said completion being in the minimum amount of $12,825,000,

(C) overdraft indebtedness in the principal sum of $1,625,454.55 plus interest thereon to the Date of Filing in the sum of $85,524.81, and

(D) costs and expenses of the Bank to the Date of Filing in the approximate sum of $831,563.72, and

15. MCC. MCC was on the Date of Filing, and still is indebted (or liable) to the Bank in connection with the indebtedness described in paragraphs 11 and 12 hereof in the sum of $133,068,831.86, consisting of the following amounts:

(A) guarantee of loan indebtedness in the outstanding principal sum of $105,586,027.03 plus interest accrued thereon to the Date of Filing in the sum of $12,115,261.75,

(B) guarantee of completion indebtedness, the cost of said completion being in the minimum amount of $12,825,000,

(C) overdraft indebtedness in the principal sum of $1,625,454.55 plus interest thereon to the Date of Filing in the sum of $85,524.81, and

(D) costs and expenses of the Bank to the Date of Filing in the approximate sum of $831,563.72.

16. (a) The consideration for the indebtedness of MCLP recited in paragraph 11(A) is loans made by the Bank to the MCLP pursuant to the agreements and evidenced by the notes and agreements referred to paragraph 21(A) below.

(b) The consideration for the indebtedness of MCLP recited in paragraph 11(B) is loans made to

Chopin, Charleston Center Corporation ("CCC"), Market Street Development Associates ("Market St.") and King Street Associates ("King St.") by the Bank and guaranteed by the MCLP pursuant to the agreements referred to in paragraph 21(B) below.

(c) The consideration for the indebtedness of MCLP recited in paragraph 11(C) is loans, in the form of overdrafts, made by the Bank to or for the benefit of MCLP pursuant to the terms of the mortgages referred to in paragraph 29(A) below.

(d) The consideration for the debt of MCLP recited in paragraph 11(D) is costs and expenses paid by the Bank pursuant to the terms of the mortgages referred to in paragraph 29(A) below.

17. (a) The consideration for the debt of Chopin recited in paragraph 12(A) is loans made by the Bank to Chopin pursuant to agreements and evidenced by the notes and agreements referred to [sic] paragraph 22(A) below.

(b) The consideration for the debt of Chopin recited in paragraph 12(B) is loans made to MCLP, CCC, Market Street and King Street by the Bank and guaranteed by Chopin pursuant to the agreements referred to in paragraph 22(B) below.

(c) The consideration for the debt of Chopin recited in paragraph 12(C) is loans, in the form of overdrafts, made by the Bank to or for the benefit of Chopin pursuant to the terms of the mortgages referred to in paragraph 29(B) below.

(d) The consideration for the debt of Chopin recited in paragraph 12(D) is costs and expenses paid by

the Bank pursuant to the terms of the mortgages referred to in paragraph 29(B) below.

18. (a) The consideration for the debt of Holywell recited in paragraphs 13(A) and (B) above is loans made by the Bank to Chopin and MCLP. Holywell is the sole stockholder of MCC, which corporation is a general partner of Chopin and MCLP. Holywell's agreement to pay the loans referred to in paragraphs 13(A) and (B) is evidenced by the instruments set forth in paragraph 23(A) below. Holywell's agreement to pay for the lien free completion of construction is evidenced by the instrument set forth in paragraph 23(B) below.

(b) The consideration for the debt of Holywell recited in paragraph 13(C) is loans, in the form of overdrafts, made by the Bank to or for the benefit of MCLP and Chopin pursuant to the terms of the mortgages and agreements referred to in paragraph 23(C) below. Holywell's agreement to pay said overdraft loans is evidenced by the instruments set forth in paragraph 23(A) below.

(c) The consideration for the debt of Holywell recited in paragraph 13(D) is costs and expenses paid by the Bank pursuant to the terms of the mortgages and agreements referred to in paragraph 23(C) below. Holywell's agreement to pay said costs and expenses is evidenced by the instruments referred to in paragraph 23(A) below.

19. (a) The consideration for the indebtedness of Gould recited in paragraphs 14(A) and (B) above is loans made by the Bank to Chopin, MCLP, CCC, Market Street and King Street and Holywell. Gould is, or was at the

time of the loans, a general partner of Market St., King St., Chopin and MCLP. Gould is the president and sole stockholder of Holywell. Holywell is or was, at the time of the loan, the sole stockholder of CCC and Gould is, or was at the time of the loan the president of CCC. Gould's agreement to pay the loans referred to in paragraph 14(A) is evidenced by the instruments referred to in paragraph 24(A) below. Gould's agreement to pay for the lien free completion of construction is evidenced by the instrument referred to in paragraph 24(B) below.

(b) The consideration for the indebtedness of Gould recited in paragraph 14(C) is loans, in the form of overdrafts, made by the Bank to or for the benefit of MCLP and Chopin pursuant to the terms of the mortgages and agreements referred to in paragraphs 29(A) and (B) below. Gould's agreement to pay said overdraft loans is evidenced by the instruments set forth in paragraph 24(A) below.

(c) The consideration for the indebtedness of Gould recited in paragraph 14(D) is costs and expenses paid by the Bank pursuant to the terms of the mortgages and agreements referred to in paragraphs 29(A) and (B) below. Gould's agreement to pay said costs and expenses is evidenced by the instruments referred to in paragraph 24(A) below.

20. (a) The consideration for the indebtedness of MCC recited in paragraphs 14(A) and (B) above is loans made by the Bank to Chopin and MCLP. MCC is a general partner of Chopin and MCLP. MCC's agreement to pay the loans referred to in paragraph 14(A) is evidenced by the instruments set forth in paragraph 25(A) below.

MCC's agreement to pay for the lien free completion of construction is evidenced by the instrument set forth in paragraph 25(B) below.

(b) The consideration for the indebtedness of MCC recited in paragraph 14(C) is loans, in the form of overdrafts, made by the Bank to or for the benefit of MCLP and Chopin pursuant to the terms of the mortgages and agreements referred to in paragraphs 29(A) and (B) below. MCC's agreement to pay said overdraft loans is evidenced by the instruments set forth in paragraph 25(A) below.

(c) The consideration for the indebtedness of MCC recited in paragraph 14(D) is costs and expenses paid by the Bank pursuant to the terms of the mortgages and agreements referred to in paragraphs 29(A) and (B) below. MCC's agreement to pay said costs and expenses is evidenced by the instruments referred to in paragraph 25(A) below.

21. (A) The indebtedness of MCLP set forth in paragraph 11(A) above is evidenced by and founded upon the following instruments:

(a) Note, dated March 27, 1980, in the principal amount of $42,000,000.00, with an unpaid principal balance of $42,000,000.00 plus interest accrued to the Date of Filing in the sum of $4,214,583.33, a copy of which is annexed hereto as Exhibit "A".

(b) Note, dated March 27, 1980, in the principal amount of $47,500,000.00, with an unpaid principal balance of $47,500,000 plus interest accrued to the Date of

Filing in the sum of $4,766,493.07, a copy of which is annexed hereto as Exhibit "B".

(c) Note, dated May 26, 1982, in the principal amount of $24,000,000.00, with an unpaid principal balance of $24,000,000.00, plus interest accrued to the Date of Filing in the sum of $2,896,999.99, a copy of which is annexed hereto as Exhibit "C".

(d) Note, dated August 27, 1982, in the principal amount of $11,000,000.00, with an unpaid principal balance of $11,000,000, plus interest accrued to the Date of Filing in the sum of $1,289,902.79, a copy of which is annexed hereto as Exhibit "D".

(e) Note, dated December 2, 1982, in the principal sum of $8,000,000.00, with an unpaid principal balance of $8,000,000, plus interest accrued to the Date of Filing in the sum of $938,111.16, a copy of which is annexed hereto as Exhibit "E".

(f) Note, dated December 9, 1982, in the principal amount of $10,000,000.00, with an unpaid principal balance of $10,000,000, plus interest accrued to the Date of Filing in the sum of $1,172,638.93, a copy of which is annexed hereto as Exhibit "F".

(g) Note, dated January 20, 1983, in the principal amount of $8,000,000.00, with an unpaid principal balance of $8,000,000, plus interest accrued to the Date of Filing in the sum of $938,111.16, a copy of which is annexed hereto as Exhibit "G".

(h) Note, dated June 23, 1983, in the principal amount of $5,300,000.00, with an unpaid principal balance of $5,254,808.32, plus interest accrued to the Date of

filing in the sum of $616,199.28, a copy of which is annexed hereto as Exhibit "H".

(i) Note, dated December 13, 1983, in the principal amount of $12,525,419.83, with an unpaid principal balance of $12,525,419.83, plus interest accrued to the Date of Filing in the sum of $1,468,779.48, a copy of which is annexed hereto as Exhibit "I".

(j) Note, dated December 13, 1983, in the principal sum of $1,800,957.96, with an unpaid principal balance of $1,800,957.96, plus interest accrued to the Date of Filing in the sum of $211,187.35, a copy of which is annexed hereto as Exhibit "J".

(k) Note, dated December 13, 1983, in the principal amount of $87,874.33, with an unpaid principal balance of $87,874.33, plus interest accrued to the Date of Filing in the sum of $10,304.55, a copy of which is annexed hereto as Exhibit "K".

(l) Note, dated December 21, 1983, in the principal amount of $1,916,966.59, with an unpaid principal balance of $1,916,966.59, plus interest accrued to the Date of Filing in the sum of $224,790.95, a copy of which is annexed hereto as Exhibit "L".

(m) Building Loan Agreement, dated March 27, 1980 a copy of which is annexed hereto as Exhibit "M".

(B) The indebtedness of MCLP set forth in paragraph 11(B) above is evidenced by and founded upon the following instruments:

(a) Guarantee of Payment, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "N", which guarantee relates to a certain Note, dated August

24, 1983, in the principal amount of $2,438,620.50, from CCC, Market St. and King St. to the Bank, upon which Note there is due and owing accrued and unpaid interest in the amount of $44,708.05.

(b) Guarantee of Payment, dated August 24, 1983, a copy of which is amended hereto as Exhibit "O", which guarantee relates to a certain Note, dated August 24, 1983, in the principal amount of $1,796,858.92, from CCC, Market St. and King St. to the Bank, upon which Note there is due and owing accrued and unpaid interest in the amount of $32,942.43.

(c) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "P", which guarantee relates to a certain Note, dated March 27, 1980, in the principal amount of $23,000,000.00 from Chopin to the Bank, which Note has an unpaid principal balance of $23,000,000.00 plus interest accrued to the Date of Filing in the sum of $2,348,236.11.

22. (A) The indebtedness of Chopin set forth in paragraph 12(A) above is evidenced by and founded upon the following instruments:

(a) Note, dated March 27, 1980, in the principal amount of $23,000,000, with an unpaid principal balance of $23,000,000, plus interest accrued to the Date of Filing in the sum of $2,348,236.11, a copy of which is annexed hereto as Exhibit "Q".

(b) Note, dated May 26, 1982, in the principal amount of $24,000,000, with an unpaid principal balance of $24,000,000.00, plus interest accrued to the Date of

Filing in the sum of $2,896,999.99, a copy of which is annexed hereto as Exhibit "C".

(c) Note, dated August 27, 1982, in the principal amount of $11,000,000, with an unpaid principal balance of $11,000,000, plus interest accrued to the Date of Filing in the sum of $1,289,902.79, a copy of which is annexed hereto as Exhibit "D".

(d) Note, dated December 2, 1982, in the principal sum of $8,000,000, with an unpaid principal balance of $8,000,000, plus interest accrued to the Date of Filing in the sum of $938,111.16, a copy of which is annexed hereto as Exhibit "E".

(e) Note, dated December 9, 1982, in the principal amount of $10,000,000, with an unpaid principal balance of $10,000,000, plus interest accrued to the Date of Filing in the sum of $1,172,638.93, a copy of which is annexed hereto as Exhibit "F".

(f) Note, dated January 20, 1983, in the principal amount of $8,000,000, with an unpaid principal balance of $8,000,000, plus interest accrued to the Date of Filing in the sum of $938,111.16, a copy of which is annexed hereto as Exhibit "G".

(g) Note, dated June 23, 1983, in the principal amount of $5,300,000, with an unpaid principal balance of $5,254,808.32, plus interest accrued to the Date of Filing in the sum of $616,199.28, a copy of which is annexed hereto as Exhibit "H".

(h) Note, dated December 13, 1983, in the principal amount of $12,525,419.83, with an unpaid principal balance of $12,525,419.83, plus interest accrued to the

Date of Filing in the sum of $1,468,779.48, a copy of which is annexed hereto as Exhibit "I".

(i) Note, dated December 13, 1983, in the principal sum of $1,800,957.96, with an unpaid principal balance of $1,800,957.96, plus interest accrued to the Date of Filing in the sum of $211,187.35, a copy of which is annexed hereto as Exhibit "J".

(j) Note, dated December 13, 1983, in the principal amount of $87,874.33, with an unpaid principal balance of $87,874.33, plus interest accrued to the Date of Filing in the sum of $10,304.55, a copy of which is annexed hereto as Exhibit "K".

(k) Note, dated December 21, 1983, in the principal amount of $1,916,966.59, with an unpaid principal balance of $1,916,966.59, plus interest accrued to the Date of Filing in the sum of $224,790.95, a copy of which is annexed hereto as Exhibit "L".

(l) Land Loan Agreement, dated March 27, 1980 a copy of which is attached hereto as Exhibit "R".

(B) The indebtedness of Chopin set forth in paragraph 12(B) above is evidenced by and founded upon the following instruments:

(a) Guarantee of Payment, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "N", which guarantee relates to a certain Note, dated August 24, 1983, in the principal amount of $2,438,620.50, from CCC, Market St. and King St. to the Bank upon which Note there is due and owing accrued and unpaid interest in the amount of $44,708.05.

(b) Guarantee of Payment, dated August 24, 1983, a copy of which is amended hereto as Exhibit "O", which guarantee relates to a certain Note, dated August 24, 1983, in the principal amount of $1,796,858.92, from CCC, Market St. and King St. to the Bank, upon which Note there is due and owning accrued and unpaid interest in the amount of $32,942.43.

(c) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "S", which guarantee relates to two certain Notes, both dated March 27, 1980, in the principal amounts of $42,000,000 and $47,500,000, both from MCLP to the Bank, with unpaid principal balances of $42,000,000 and $47,500,000, respectively, plus interest accrued to the Date of Filing in the sum of $4,214,583.33 and $4,766,493.07, respectively.

23. (A) The indebtedness of Holywell set forth in paragraphs 13(A), (C) and (D) above is evidence by and founded upon the following instruments:

(a) Guarantee of Payment, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "T".

(b) Guarantee of Payment, dated May 28, 1982, a copy of which is annexed hereto as Exhibit "U".

(c) Guarantee of Payment, dated August 27, 1982, a copy of which is annexed hereto as Exhibit "V".

(d) Guarantee of Payment, dated December 2, 1982, a copy of which is annexed hereto as Exhibit "W".

(e) Guarantee of Payment, dated December 9, 1982, a copy of which is annexed hereto as Exhibit "X".

(f) Guarantee of Payment, dated January 20, 1983, a copy of which is annexed hereto as Exhibit "Y".

(g) Guarantee of Payment, dated June 23, 1983, a copy of which is annexed hereto as Exhibit "Z".

(h) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "AA".

(i) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "BB".

(j) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "CC".

(k) Guarantee of Payment, dated December 21, 1983, a copy of which is annexed hereto as Exhibit "DD".

(B) The amount of the indebtedness set forth in paragraph 13(B) above is based upon Turner Construction Company's analysis of funds required to complete construction, a copy of said analysis is annexed hereto as Exhibit "EE" and upon Gould's summary of mechanics liens dated July 9, 1984, a copy of said mechanics lien summary is annexed hereto as Exhibit "FF". Holywell's agreement to pay for the cost of lien free completion is founded upon the following-instrument:

Guarantee of Completion, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "GG".

(C) The Bank's authorization to advance, and MCLP's and Chopin's obligation to pay the sums set forth in paragraphs 13(C) and (D) above is set forth in the mortgages and agreements which are set forth in paragraphs 29(A) and (B) below. Holywell's guarantee of the

payment of said sums is set forth in the instruments referred to in paragraph 23(A) above.

24. (A) The indebtedness of Gould is founded upon the following instruments:

(a) Guarantee of Payment, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "T".

(b) Guarantee of Payment, dated May 28, 1982, a copy of which is annexed hereto as Exhibit "U".

(c) Guarantee of Payment, dated August 27, 1982, a copy of which is annexed hereto as Exhibit "V".

(d) Guarantee of Payment, dated December 2, 1982, a copy of which is annexed hereto as Exhibit "W".

(e) Guarantee of Payment, dated December 9, 1982, a copy of which is annexed hereto as Exhibit "X".

(f) Guarantee of Payment, dated January 20, 1983, a copy of which is annexed hereto as Exhibit "Y".

(g) Guarantee of Payment, dated June 23, 1983, a copy of which is annexed hereto as Exhibit "Z".

(h) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "AA".

(i) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "BB".

(j) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "CC".

(k) Guarantee of Payment, dated December 21, 1983, a copy of which is annexed as Exhibit "DD".

(l) Guarantee of Payment, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "N".

(m) Guarantee of Payment, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "O".

(B) The amount of the indebtedness set forth in paragraph 14(B) above is based upon Turner Construction Company's analysis of funds required to complete construction, a copy of said analysis is annexed hereto as Exhibit "EE" and upon Gould's summary of mechanics lien claims, dated July 9, 1984, a copy of said mechanics lien summary is annexed hereto as Exhibit "FF". Gould's agreement to pay for the cost of lien free completion is founded upon the following instrument:

Guarantee of Completion, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "GG".

(C) The Bank's authorization to advance, and MCLP's and Chopin's obligation to pay the sums set forth in paragraphs 14(C) and (D) above is set forth in the mortgages and agreements set forth in paragraphs 29(A) and (B) below. Gould's guarantee of the payment of said sums is set forth in the instruments referred to in paragraph 24(A) above.

25. (A) The indebtedness of MCC is founded upon the following instruments:

(a) Guarantee of Payment, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "T".

(b) Guarantee of Payment, dated May 28, 1982, a copy of which is annexed hereto as Exhibit "U".

(c) Guarantee of Payment, dated August 27, 1982, a copy of which is annexed hereto as Exhibit "V".

(d) Guarantee of Payment, dated December 2, 1982, a copy of which is annexed hereto as Exhibit "W".

(e) Guarantee of Payment, dated December 9, 1982, a copy of which is annexed hereto as Exhibit "X".

(f) Guarantee of Payment, dated January 20, 1983, a copy of which is annexed hereto as Exhibit "Y".

(g) Guarantee of Payment, dated June 23, 1983, a copy of which is annexed hereto as Exhibit "Z".

(h) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "AA".

(i) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "BB".

(j) Guarantee of Payment, dated December 13, 1983, a copy of which is annexed hereto as Exhibit "CC".

(k) Guarantee of Payment, dated December 21, 1983, a copy of which is annexed hereto as Exhibit "DD".

(B) The amount indebtedness set forth in paragraph 15(B) above is based upon Turner Construction Company's analysis of funds required to complete construction, a copy of said analysis is annexed hereto as Exhibit "EE" and upon Gould's summary of mechanics liens dated July 9, 1984, a copy of said mechanics lien summary is annexed hereto as Exhibit "FF". MCC's agreement to pay for the cost of lien free completion is founded upon the following instrument:

Guarantee of Completion, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "GG".

(C) The bank's authorization to advance, and MCLP's and Chopin's obligation to pay the sums set forth in paragraphs 14(C) and (D) above is set forth in the mortgages and agreements which are set forth in paragraphs 29(A) and (B) below. MCC's guarantee of the payment of said sums is set forth in the instruments referred to in paragraph 25(A) above.

26. Pursuant to the notes, guarantees, mortgages and agreements referred to above each of the Debtors is jointly and severally liable for interest on the principal indebtedness described in paragraph 9 hereof accruing subsequent to the Date of Filing at the default rate as provided in said instruments together with expenses incurred by the Bank in connection with the indebtedness described above.

27. In addition to the indebtedness (or liability) described in paragraph 14 hereof Gould is indebted (or liable) to the Bank as a general partner of Chopin and MCLP in the amount of $218,724,908.46, exclusive of interest and expenses for the period subsequent to the Date of Filing.

28. In addition to the indebtedness (or liability) described in paragraph 15 hereof MCC is indebted (or liable) to the Bank as a general partner of Chopin and MCLP in the amount of $218,724,908.46, exclusive of interest and expenses for the period subsequent to the Date of Filing.

29. The indebtedness and obligations of MCLP and Chopin referred to above are secured as set forth in the following paragraphs.

(A) *MCLP.* The Bank claims as security for the indebtedness of MCLP as set forth in paragraph 11 hereof, *inter alia,* a security interest in and mortgage upon the real and personal property described in the agreements described in paragraphs 29(A) (a)-(n) below:

(a) Mortgage, Assignment of Rents and Security Agreement, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "HH". The mortgage lien and security interests granted pursuant to Exhibit "HH" was perfected by the recording of the mortgage and security agreement in the public records of Dade County, Florida on March 31, 1980 in O.R. Book 10703, page 637 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(b) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated May 26, 1982, a copy of which is annexed as hereto as Exhibit "II." The Mortgage lien granted pursuant to Exhibit "II" was perfected by the recording of the mortgage in the public records of Dade County, Florida on May 28, 1982 in O.R. Book 11454 page 1129, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(c) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated August 27, 1982, which mortgage is substantially similar to the

mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien and security interests granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida on September 27, 1982 in O.R. Book 11568, page 1370 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(d) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 2, 1982, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida on December 3, 1982 in O.R. Book 11623 page 210, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(e) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 9, 1982, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien and security interests granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida, on December 10, 1982 in O.R. Book 11638, page 1467 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(f) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated January 20, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida on January 31, 1982 in O.R. Book 11685 page 371, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(g) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated June 23, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage and security agreement in the public records of Dade County, Florida on June 24, 1983 in O.R. Book 11829, page 368 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary State and of the Clerk of the Circuit Court for Dade County, Florida.

(h) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 13, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida on December 19, 1983 in O.R. Book 12001 page 1810, and by the filing of UCC-1 Financing Statements in the

office of the Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(i) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 13, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage and security agreement in the public records of Dade County, Florida on March 31, 1980 in O.R. Book 12001, page 1854 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(j) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 13, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien granted pursuant to this mortgage was perfected by the recording of the mortgage in the public records of Dade County, Florida on December 19, 1983 in O.R. Book 12001 page 1898, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(k) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, dated December 21, 1983, which mortgage is substantially similar to the mortgage annexed hereto as Exhibit "II" except for the date and amount. The mortgage lien and security interests granted pursuant to this mortgage was perfected

by the recording of the mortgage and security agreement in the public records of Dade County, Florida on December 23, 1983 in O.R. Book 12007, page 1253 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(l) Mortgage, Assignment of Leases and Rents and Security Agreement, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "JJ". The mortgage lien and security interests granted pursuant to this mortgage were perfected by the rewarding [sic] of the mortgage and security agreement in the public records of Dade County, Florida on August 29, 1983 in O.R. Book 11890, page 1455, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(m) Mortgage, Assignment of Leases and Rents and Security Agreement, dated August 24, 1983, a copy of which is annexed hereto as Exhibit "KK". The mortgage lien and security interests granted pursuant to this Mortgage were perfected by the recording of the mortgage and security agreement in the public records of Dade County, Florida on August 29, 1983, in O.R. Book 11890, page 1412, and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(n) Security Agreement, dated May 14, 1981, by Debtor to the Bank. A copy of the Security Agreement is annexed hereto as Exhibit "LL". The security interests

granted pursuant to the Security Agreement were perfected by the filing of UCC-1 Financing Statements naming MCLP as debtor in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

(B) *CHOPIN.* The Bank claims as security for the indebtedness of Chopin as set forth in paragraph 12 hereof, *inter alia*, a security interest in and mortgage upon the real and personal property described in the agreements described in paragraphs 29(A)(b)-(n) above and a mortgage upon the real and personal property described in the agreement described below:

(a) Mortgage, Assignment of Leases and Rents and Security Agreement, dated March 27, 1980, a copy of which is annexed hereto as Exhibit "MM". The mortgage lien and security interests granted pursuant to Exhibit "MM" were perfected by the recording of the mortgage and security agreement in the public records of Dade County, Florida on March 31, 1980 in O.R. Book 10703, page 585 and by the filing of UCC-1 Financing Statements in the office of the Florida Secretary of State and of the Clerk of the Circuit Court for Dade County, Florida.

WHEREFORE, the Bank respectfully prays that this Court shall, upon trial of this cause, determine (a) that the Debtors are indebted to the Bank in the amounts specified in paragraph 9 hereto with interest thereon as provided in the instruments evidencing such indebtedness without offset, defense, claims or counterclaims of any nature whatsoever and (b) that the Bank has a fully valid and duly perfected security interest in all real and personal property described in paragraphs 29(A) and (B)

hereto superior in dignity and prior in right to any other claim or interest of the Debtors, securing the indebtedness set forth in paragraph 9 hereto, together with accrued interest, attorneys' fees and costs as the Bank may reasonably incur in enforcing its rights against the Debtors without prejudice as to right, title or interest that any person not made a party to this adversary proceeding may claim in such property and grant such other and further relief as the Court may deem appropriate.

Dated: this ___ day of February, 1985

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APPENDIX J

II. SUBSTANTIVE CONSOLIDATION

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 85-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

APPENDIX K

In re HOLYWELL CORPORATION, Debtor. (Two Cases)

Fred Stanton SMITH, as Trustee of the Miami Center Liquidating Trust, Plaintiff-Appellee,

v.

UNITED STATES of America, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore B. Gould, Defendants-Appellants,

Shutts & Bowen, Intervenor,

Bank of New York, Defendant-Appellee.

Fred Stanton SMITH, as Trustee of the Miami Center Liquidating Trust, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant,

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore B. Gould, Defendants-Appellants,

Shutts & Bowen, Intervenor,

Bank of New York, Defendant-Appellee.

No. 89-5862.

United States Court of Appeals, Eleventh Circuit.

Sept. 18, 1990.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this bankruptcy case, we affirm the district court's ruling that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization ("Plan") nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties.

FACTS

Miami Center Limited Partnership ("MCLP"), a Florida limited partnership, obtained a construction mortgage from the Bank of New York ("BNY") to develop the "Miami Center," an office building and hotel complex in Miami, Florida. Following default on the mortgage, MCLP, Holywell Corporation, Chopin Associates, Theodore Gould, Miami Center Corporation, and other "insiders" (hereinafter collectively referred to as the "debtors") as defined in 11 U.S.C. § 101(30)(C) (West Supp.1990) each filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978.[1]

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[1] Theodore B. Gould, a debtor, owned 100 percent of the stock of Holywell Corporation (debtor), and also served as president and director of Holywell. Holywell Corporation owned 100 percent of the stock of Miami Center Corporation ("MCC") (debtor), and Gould served as president and director of MCC. Gould and MCC were the sole general partners of Chopin Associates (debtor) and of Miami Center Limited Partnership (debtor).

Both BNY and the debtors submitted competing plans of reorganization and accompanying disclosure statements to the bankruptcy court. The Internal Revenue Service ("IRS"), a creditor, received copies of the plans and disclosure statements and also received notice of all scheduled hearings before the bankruptcy court. On October 10, 1985, following overwhelming approval by the creditors, the bankruptcy court confirmed BNY's amended Plan of Reorganization. The district court affirmed the confirmation order. *See Holywell Corporation v. Bank of New York,* 59 B.R. 340 (S.D.Fla.1986). This court subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the Plan was substantially consummated and no effective relief could be fashioned. *See Miami Center Limited Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir.), *cert. denied,* 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

The Plan required consolidation of the debtors' estates, establishment of a liquidating trust, and appointment of a liquidating trustee.[2] The Plan was funded by all the debtors' assets, as defined in section 541(a) of the

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[2] The parties refer to the trustee created pursuant to the Plan as the "liquidating trustee." Article V of the Plan provides that "[a] trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors." The trustee's responsibilities include the identification and payment of all valid claims against the estate with payment of the sum remaining to the debtors. On August 12, 1985, a United States Bankruptcy Court judge appointed Fred Stanton Smith trustee of the estate.

Bankruptcy Code, including proceeds from the pre-confirmation sale of certain of Holywell Corporation's properties (hereinafter the "Washington properties") and the anticipated post-confirmation sale of the Miami Center property. The Plan had no express provision requiring the liquidating trustee to either file tax returns or pay income taxes.

The corporate debtors did not file a tax return concerning the sale of pre-confirmation properties until January 4, 1988, although any gain would have been realized during the fiscal year ending July 31, 1985.[3] At that time they requested the liquidating trustee to pay the taxes owed. Neither the corporate debtor nor the liquidating trustee filed a tax return for the fiscal year ending July 31, 1986, which would have included gains realized from the sale of the Miami Center property.

PROCEDURAL HISTORY

The liquidating trustee filed an adversary proceeding in the United States Bankruptcy Court in December, 1987, naming the United States, BNY, and the debtors as defendants. The liquidating trustee sought a declaratory judgment concerning the obligation to file income tax returns and pay taxes, if any, in connection with the sale of the Washington properties and the Miami Center. On April

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[3] Shortly after the complaint was filed, Holywell Corporation mailed a consolidated federal income tax return for the fiscal year ending July 31, 1985, to the Internal Revenue Service. The return showed a liability for taxes, interest, and penalties totalling $264,309. Holywell simultaneously demanded that the trustee pay that amount.

28, 1988, the bankruptcy court entered final judgment declaring that the liquidating trustee was not responsible for filing or paying income taxes.

Following entry of final judgment, both the United States and the debtors filed notices of appeal. After consolidating the appeals, the district court granted the debtors' emergency motion to stay the final judgment of the bankruptcy court. The court also granted the motion of a law firm, Shutts and Bowen, special counsel to the liquidating trustee, to intervene in the consolidated appeal for the purpose of seeking a lift of the stay in order to obtain payment of $917,000 in attorney fees.

BNY moved to dismiss the appeal, as moot, and the liquidating trustee moved for authorization to consummate the settlement with Dade County of *ad valorem* tax claims.

In July, 1989, the district court granted in part, and denied in part, the BNY's motion to dismiss. The court dismissed the appeal to the extent that the debtors sought to challenge the Plan based on allegations that BNY, through its plan of reorganization, attempted to defraud the government of income taxes. The district court denied the motion to the extent that the government and the debtors sought to enforce provisions of the Plan which they contended provided for the payment of income taxes. Additionally, the district court vacated its earlier stay of the bankruptcy court's final judgment.

CONTENTIONS

The government and the debtors contend that this court has jurisdiction to decide whether the liquidating

trustee is responsible for filing income tax returns and paying income taxes in connection with the sale of the properties. Insofar as the merits of the complaint are concerned, they contend that under certain provisions of the Plan, the liquidating trustee was obligated to file and pay income taxes. Additionally, they contend that certain statutory provisions of the Income Tax Code require that the liquidating trustee file and pay taxes. Moreover, they contend that once that obligation arises, the grantor trust provisions of the Internal Revenue Code do not relieve the liquidating trustee of that duty.

The liquidating trustee contends that this court lacks jurisdiction to hear this appeal because the allegations constitute a substantial modification of the Plan. Addressing the merits, the liquidating trustee contends that the debtors were required to file tax returns and pay taxes, if any, relating to the sale of pre-confirmation and post-confirmation properties.

ISSUES

We address the following issues: (1) whether this appeal is moot; (2) whether the provisions of the plan require that the liquidating trustee pay all applicable income taxes on the sale of the pre-confirmation and post-confirmation properties; and (3) whether the income tax laws require that the liquidating trustee pay all applicable income taxes.

DISCUSSION

A. *Mootness*

The government and the debtors contend that we have jurisdiction to decide this case despite our earlier decision dismissing their appeal of the district court's confirmation of the Plan. According to the government and the debtors, we have jurisdiction to decide whether the liquidating trustee failed to discharge his duties in accordance with the terms of the Plan. Further, they contend that we have jurisdiction to redress BNY's fraudulent act of submitting a plan of reorganization which failed to disclose the absence of any provision relating to the payment of income taxes.

The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. *See Markstein v. Massey Associates Ltd.*, 763 F.2d 1325 (11th Cir.1985); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981); *Miami Center Limited Partnership*, 838 F.2d 1547. The mootness standard "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center Limited Partnership*, 838 F.2d at 1553 (quoting *In re Sewanee Land Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984)). In dismissing the debtors' previous challenge, this court was guided by "the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained." *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in its ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine. The allegation seeks to alter the Plan by challenging the terms and provisions which the bankruptcy court and the district court approved. We also conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is therefore barred. The need for finality requires that we decline to address the merits of these allegations which seek to challenge the court-approved Plan.

We reject the debtors' attempt to create an exception to the mootness doctrine based on the holding of *In re Seminole Park & Fairgrounds, Inc.*, 502 F.2d 1011 (5th Cir.1974). In *In re Seminole Park*, the court held that the allegation was not "a belated effort to alter or amend the plan." *In re Seminole Park*, 502 F.2d at 1014. In this case, however, we have concluded that the allegations seek to amend or modify the Plan. Thus, we find this case distinguishable from *In re Seminole Park*.

The allegation that certain provisions of the Plan and/or provisions of the Income Tax Code require the liquidating trustee to file and pay income taxes is not an attempt to modify or alter the Plan. The focus of this allegation is that the liquidating trustee failed to act in accordance with the court-approved Plan. Thus, we address the merits of this claim because it seeks to enforce existing provisions of the Plan. *See In re Seminole Park*, 502 F.2d 1011 (bankruptcy court has power to assure that court-approved plan is consummated in fact).

B. *Provisions of the Plan*

The Plan required that the liquidating trustee acquire the trust property and dispose of it in accordance with the terms of the Plan. As stated earlier, the Plan makes no express provision for the payment of federal income taxes. Consequently, we must determine whether any of the provisions of the Plan can reasonably be interpreted as requiring the liquidating trustee to file income tax returns and pay income taxes.

The government argues that Article I of the Plan permits it to recover income taxes as an administration claim. Article I of the Plan provides for the payment of actual and necessary expenses of preserving the bankrupt estate as administration claims. The Plan conditions payment, however, to claims for which proof of claim has been filed or a liability scheduled by the debtor. Since the IRS never filed a proof of claim for taxes and the debtors never scheduled such taxes as a liability, such a claim cannot qualify as an administration claim.

The government and the debtors also assert that section 503 of the Bankruptcy Code obligates the liquidating trustee to pay income taxes. Title 11 U.S.C. § 503 provides that "an entity may file a request for payment of an administrative expense after notice and hearing." It is generally accepted that taxes incurred by a bankrupt estate fall within the definition of administrative expenses. *See In re Lambdin,* 33 B.R. 11 (Bkrtcy.M.D. Tenn.1983). Pre-confirmation taxes are thus recoverable under this provision. In order to recover payment for administrative expenses, however, a claim must be filed

in a timely fashion. *In re Holywell Corp.*, 68 B.R. 134, 137 (Bkrtcy.S.D.Fla.1986).

We conclude that the IRS cannot recover under section 503 for income taxes because it failed to file its claim in a timely fashion. The debtors filed for bankruptcy on August 22, 1984. The bankruptcy court established January 15, 1985, as the claim bar date. The IRS, despite having notice of the proceedings, filed no claim. In fact, it was not until the liquidating trustee filed the declaratory judgment action in December, 1987, that the government seriously asserted a claim for income taxes. In an earlier proceeding in this case, the bankruptcy court held that claims filed by the IRS on October 16, 1985, and November 6, 1985, were time-barred. A similar conclusion is clearly appropriate in this case.

Post-confirmation taxes are not recoverable as administrative expenses under 11 U.S.C. § 503. In *United States v. Redmond*, 36 B.R. 932, 934 (Bkrtcy.D.C.Kan.1984) the court was faced with a post-petition claim by the IRS for unpaid employment and unemployment taxes. The court rejected the IRS's claim that such taxes constituted administrative expenses under 11 U.S.C. § 503. The court stated that "upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases. As such, the tax liability of the reorganized debtor was not incurred in administering the bankruptcy estate." *United States v. Redmond*, 36 B.R. at 934. As the court noted, post-confirmation tax is normally a liability of the debtor. *See Redmond*, 36 B.R. at 934.

We also reject the assertion that Article V of the Plan obligates the liquidating trustee to pay income taxes on the sale of post-petition properties. Article V, paragraph 6 provides:

> All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed claims.

As stated above, administration of the estate ceases upon confirmation of a plan of reorganization. *See Redmond*, 36 B.R. at 934. Thus, taxes which accrue post-confirmation are not incurred in administering the Trust, and are not recoverable under Article V of the Plan.

Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes.

C. *Statutory Requirements*

The government and the debtors strenuously argue that 26 U.S.C. §§ 6012(b)(3), (4) and 6151 require, as a matter of law, that the liquidating trustee file and pay income taxes. Under those provisions, the "trustee in a case under title 11, or an assignee" and the fiduciary of an individual debtor's estate are responsible for filing of

returns and paying of taxes owed by a corporate and individual debtors respectively.[4]

The bankruptcy judge found that these provisions did not apply in this case. The bankruptcy judge concluded that because of the limited and essentially ministerial function assigned to the trustee by the Plan, he was a contract trustee rather than a trustee in a case under Title 11. Additionally the bankruptcy judge concluded that because of the liquidating trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Plan, he was more akin to a disbursement agent than an assignee or fiduciary.

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[4] Title 26 U.S.C. § 6012(b)(3), (4) provides as follows:

> (3) In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not each party or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.
>
> (4) . . . Returns of an estate . . . of an individual under chapter . . . 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

Title 26 U.S.C. § 6151 provides, in pertinent part that:

> (a) [w]hen a return of tax is referred under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed. . . .

We reject the government's contention that the legislative history of 26 U.S.C. § 6012(b)(3) indicates that it was intended to apply to the trustee in this case. The government suggests that because the liquidating trustee was appointed by a court which acquired jurisdiction by virtue of 11 U.S.C. § 105, we should construe the liquidating trustee's appointment as that of a trustee under Title 11. Alternately, the government argues that the liquidating trustee is either an assignee, receiver, or fiduciary of the debtors and thus governed by the requirements of 26 U.S.C. § 6012.

Based on our review of the statutory provisions, we agree with the district court's conclusion that 26 U.S.C. § 6012 does not apply in this case. By its terms, section 6012 refers only to trustees who are appointed under Chapter 11 of the Bankruptcy Code. If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform.

In deciding whether to extend the provisions of section 6012, we find *In re Allen Wood Steel Co.*, 7 B.R. 697 (Bkrtcy.E.D.Pa.1980) instructive. In *In re Allen Wood Steel Co.*, the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to those in this case. We agree with the district court that section 6012 does not apply to the liquidating trustee, and rely on its analysis. First, we conclude that the liquidating trustee is not a trustee under Title 11, but

rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary.

CONCLUSION

We dismiss, as moot, the allegation that the bankruptcy court lacked authority to confirm the Plan, and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan. We accept jurisdiction to decide whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions. We hold, however, that neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes. Accordingly, we affirm the district court.

AFFIRMED

COX, Circuit Judge, dissenting:

I believe that under 26 U.S.C. § 6012(b)(3) and (4) and section 6151 the liquidating trustee is obligated both to file income tax returns and to pay taxes on behalf of the corporate debtors and the estate of the individual debtor. Contrary to the court's holding, I believe that section 6012(b)(3) applies to an individual, like the liquidating trustee in this case, who is appointed as a part of a confirmed plan of reorganization and who possesses title to substantially all the debtors' assets. I further conclude that given the broad powers granted to the liquidating

trustee in Article V of the Plan, he qualifies as a "fiduciary" within the meaning of section 6012(b)(4).

The court holds that "section 6012 refers *only* to trustees who are *appointed under Chapter 11* of the Bankruptcy Code" (emphasis added). The court reasons that since the liquidating trustee was appointed to administer the Plan, he is a "contract trustee" as opposed to a trustee appointed under title 11. The plain language of section 6012(b)(3), however, makes its filing requirements applicable to a "trustee *in a case* under title 11 of the United States Code. . . . " (emphasis added). While it is not readily apparent from the face of the opinion, the court seems to have equated the meaning of the phrase "a trustee in a case under title 11" with the Bankruptcy Code's definition of a trustee appointed under 11 U.S.C. § 1104(a) (1979).[1] This interpretation of section 6012(b)(3) is too restrictive and fails to comport with the broad wording of the statute. Section 6012(b)(3) is properly view as encompassing trustees of a corporate debtor who, like the liquidating trustee, are appointed to administer a reorganization plan in a bankruptcy case. It is not limited to just those trustees who are appointed under 11 U.S.C. § 1104 or section 702.

The legislative history of section 6012(b)(3) further indicates that Congress intended this section to reach a broad spectrum of persons acting in a fiduciary capacity

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[1] 11 U.S.C. § 1104(a) (1979) in pertinent part reads:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee –

for a corporation in bankruptcy. Committee reports suggest that the phrase "receiver, trustee in a case under title 11 of the United States Code, or assignee . . . " is to be read as encompassing "receivers or other fiduciaries." H.R.Rep. No. 1337, 83d Cong., 2d Sess, 3, *reprinted in* 1954 U.S.Code Cong. & Admin.News 4017, 4543; and S.Rep. No. 1622, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S.Code Cong. & Admin.News 4621, 5211. Thus, section 6012(b)(3) anticipates any situation where substantially all the assets of a corporation are vested in a person acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

The court further holds that the liquidating trustee is more like a "disbursing agent" of the trust rather than a "fiduciary" of the individual debtor. Article V of the Plan vests the liquidating trustee with all right, title, and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. . . . " Article V, paragraph 3. These broad powers include the power to lease, improve or encumber the property, the authority to sue and be sued, and the power to settle litigation in which the debtors are involved and to waive rights on behalf of the debtors.

The court's attempt to characterize the liquidating trustee as simply a disbursing agent denies the reality of his rights, duties and obligations under the Plan. A mere

label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."[2] Consequently, he is obligated under section 6012(b)(4) to file returns on behalf of the individual debtor.

The court nonetheless analogizes the facts of this case to those in *In re Alan Wood Steel Co.*, 7 B.R. 697 (Bankr. E.D.Pa. 1980), to support its conclusion that the liquidating trustee is a "disbursing agent" instead of an assignee or fiduciary of the debtors. However, *In re Alan Wood* is distinguishable from the present case. *In re Alan Wood* involved a disbursing agent under the former Bankruptcy Act.[3] The disbursing agent in *In re Alan Wood* did not have possession of or hold title to the property of the debtors. Moreover, by statute he was only entitled to "distribute, subject to the control of the court, the consideration . . . deposited by the debtor." 7 B.R. at 701 (quoting 11 U.S.C. §§ 110, 743 and 737 (1976)). In this case, the liquidating trustee has possession of the debtors' property and is authorized to do more than simply distribute funds. Therefore, the liquidating trustee more closely

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[2] A "fiduciary" is defined broadly in § 7701(a)(6) of the Internal Revenue Code as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity."

[3] *In re Alan Wood Steel Co.* was decided under the old Bankruptcy Act which provided for the appointment of bankruptcy trustees under § 44(a), receivers under § 332, and disbursing agents under § 337(a). A disbursing agent is a statutorily distinct entity.

approximates an assignee or fiduciary than a disbursing agent.

Since both section 6012(b)(3) and (4) apply to the liquidating trustee, he is obligated to file tax returns on behalf of the corporate debtors and the estate of the individual debtor. Necessarily, then, he is also responsible for the payment of those taxes under 26 U.S.C. § 6151. The court's decision to the contrary encroaches upon the IRS's ability to collect taxes successfully in situations where a reorganization plan provides for the appointment of a trustee to take possession of substantially all the debtors' assets and to administer the Plan. Although the court encourages us to take consolation in the fact that the government may seek collection of the tax monies from the reorganized debtor, it remains unclear from where that money will come.
